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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PHILIP J. BERG, ESQUIRE,
Petitioner,

v.

BARACK HUSSEIN OBAMA, JR., *et al.*,
Respondents.

Petition for Writ of Certiorari Before Judgment From the Third Circuit Court of Appeals

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a citizen of the United States has standing to challenge the Constitutional qualifications of a Presidential Nominee under the "Natural Born Citizen Clause" when deprivation of the right to such a challenge would result in the infringement on a citizen's Constitutional right to vote?

2. Isn't it true that no one has the responsibility to ensure a United States Presidential Candidate is eligible to serve as President of the United States?

3. Are there proper steps for a voter to ensure a Presidential Candidate is qualified and eligible to serve as President of the United States?

4. Isn't it true there are not any checks and balances to ensure the qualifications and eligibility of a Presidential candidate to serve as President of the United States?

LIST OF PARTIES

1.) PHILIP J. BERG, ESQUIRE, Plaintiff and Appellate;

2.) BARACK HUSSEIN OBAMA, a/k/a
BARACK HUSSEIN DUNHAM a/k/a
BARACK HUSSEIN SOETORO a/k/a
BARRY OBAMA a/k/a
BARRY DUNHAM a/k/a
BARRY SOETORO, [hereinafter "Obama"], Defendant;

3.) THE DEMOCRATIC NATIONAL COMMITTEE, [hereinafter "DNC"], Defendant;

4.) THE FEDERAL ELECTION COMMISSION, [hereinafter "FEC"], Defendant;

5.) SECRETARY OF THE COMMONWEALTH, Pennsylvania StateDepartment, Defendant;

6.) PEDRO A, CORTÉS, Secretary of the Commonwealth, Pennsylvania Department of State, [hereinafter "Cortes"], Defendant;

7.) U.S. SENATE, COMMISSION ON RULES AND ADMINISTRATION, Defendant; and

8.) DIANE FEINSTEIN, Chairman, U.S. Senate, Commission on Rules and Administration, [hereinafter "Feinstein"], Defendant.

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PETITION FOR A WRIT OF CERTIORARI

CITATION TO OPINIONS BELOW

The Memorandum and Order of the United States District Court, Eastern District of Pennsylvania, *Berg v. Obama, et al*, 08-cv-4083 (2008), is attached to the Appendix as **Exhibit "A"**.

JURISDICTION

The United States District Court, Eastern District of Pennsylvania entered its Order on October 24, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §2101(e), Mr. Berg having asserted below and asserting in this petition the deprivation of rights secured by the United States Constitution.

Jurisdiction of the United States Supreme Court pursuant to is invoked under Supreme Court Rules 10 and 11 (hereinafter, "Rule 10" and Rule 11"). Rule 10 provides that "[a] review on writ of

certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore." Jurisdiction of this Court is invoked under rule 10(c) which provides that review should be granted when the court below "has decided an important question of federal law which has not been, but should be settled by this Court..." Supreme Court Rule 10(c). Although the case is pending before the Third Circuit Court of Appeals and it has not entered any order or judgment, the Supreme Court may still grant certiorari under Rule 11 because this case "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination of this Court." Supreme Court Rule 11.

Jurisdiction of the United States Supreme Court is appropriate in this case because the matter involves a matter that is novel and is of extreme importance to the general public interest and the administration of justice. Jurisdiction may be invoked under the Supreme Court Rule 10, entitled Considerations Governing Review on Writ of Certiorari (hereinafter, "Rule 10"). This standard includes intervention to prevent a gross miscarriage of justice.

The Judicial Administration Standards have also recommended criteria for discretionary review. These are "that the matter involves a question that is novel or difficult, is the subject of conflicting authorities applicable within the jurisdiction, or is of importance in the general public interest or in the administration of justice." STANDARDS RELATING TO APPELLATE COURTS 3.10C (1977). Under the

latter standard this case, which involves a matter that is novel and is of extreme importance to the general public interest, the jurisdiction of the Supreme Court is invoked.

This Court has the inherent power to act upon a petition for certiorari and render a decision with extraordinary speed when the need for prompt action is urgent as the case involves extraordinary public significance. See *Weeks v. Angelone*, 527 U.S. 1060 (1999); *Bush v. Gore*, 531 U.S. 1046 (2000). This case involves extraordinary public significance and requires action urgently as the Presidential election is less than five (5) days away.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves Article II, Section I, Clause 4 of the United States Constitution, which provides that, "*No person except a "natural born"*

Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President, neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."

2. This case involves the Fourteenth Amendment to the United States Constitution, which provides, in relevant part, that "No state may deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

3. Article III, Section 2 of the United States Constitution provides that the federal judicial power is limited to "Cases . . . [and] Controversies."

STATEMENT OF THE CASE

This case raises important, recurring questions relating to the presumptive scope of the

United States Constitution, Article III, Section 2 Standing issues which pertain to questioning the qualifications and eligibility of a Presidential Candidate, pursuant to Article II, Section I, Clause 5 of the United States Constitution, to serve as President of the United States.

Moreover, the case raises the issues of (1) who has the right to question the qualifications of a Presidential candidate, (2) who is delegated the responsibility of ensuring the Presidential candidates are in fact qualified, and (3) who has standing in our Court systems to raise these issues with the appropriate Courts.

This case involves national security, extraordinary public significance and requires action urgently as the Presidential election is less than five (5) days away.

Furthermore, top secret briefing of the Presidential candidates has already begun and if Obama is not a "natural born" citizen or citizen at all for that matter, his briefing is placing all American citizens and the United States of America in grave danger.

A. Obama Was Born in Mombosa, Kenya and Therefore is not a "Natural Born" United States Citizen

Upon investigation into the alleged birth of Obama in Honolulu, Hawaii, Obama's birth is reported as occurring at two (2) separate hospitals, Kapiolani Hospital and Queens Hospital. The *Rainbow Edition News Letter*, published by the Education Laboratory School, produced in its November 2004 Edition an article from an interview with Obama and his half-sister, Maya Soetoro, in which the publication reports that Obama was born August 4, 1961 at Queens Medical Center in

Honolulu, Hawaii. Four years later, in a February 2008 interview with the Hawaiian newspaper *Star Bulletin*, Maya Soetoro states that her half-brother, Obama, was born August 4, 1961, this time in Kapiolani Medical Center for Women & Children.

Through extensive investigation, learned that Obama was born in Mombasa, Kenya. Obama's biological father was a Kenyan citizen and Obama's mother a U.S. citizen who was not old enough to register Obama's birth in Hawaii as a "natural born" United States Citizen. The laws on the books at the time of Obama's birth required the U.S. Citizen to have resided in the Untied States for ten (10) years, five (5) of which were after the age of fourteen (14). Obama's mother was only 18 when Obama was born in Kenya. Nationality Act of 1940, revised June 1952; *United States of America v. Cervantes-Nava*, 281 F.3d 501 (2002); *Drozd v. I.N.S.*, 155 F.3d 81, 85-88

(2d Cir.1998). The Birth of Obama in Kenya has been verified.

For above aforementioned reasons, Obama's mother could have only registered Obama's birth in the United States as a "naturalized" citizen. A "naturalized" United States citizen is not eligible to run for and/or hold the Office of the Presidency.

B. Obama Became a "Natural" Citizen of Indonesia when his Indonesian Stepfather Legally Acknowledged Obama as his Son and/or Adopted Obama.

In or about 1965, when Obama was approximately six (6) years old, his mother, Stanley Ann Dunham, married Lolo Soetoro, a citizen of Indonesia, and moved to Indonesia with Obama. A minor child follows the naturalization and citizenship status of their custodial parent. A further issue is presented that Obama's Indonesian stepfather, Lolo Soetoro, either (1) signed an

acknowledgement legally "acknowledging" Obama as his son or (2) adopted Obama, either of which changed any citizenship status of Obama to a "natural citizen" of Indonesia.

Obama admits in his book, *Dreams from my Father*, that after his mother's marriage to Lolo Soetoro, Lolo Soetoro left Hawaii rather suddenly. Obama and his mother left for Indonesia a couple of months thereafter. Obama admits that, when he arrived in Indonesia, he had already been enrolled in Fransiskus Assisi School in Jakarta, Indonesia a public school. Lolo Soetoro could not have enrolled Obama in school unless Obama was a citizen of Indonesia and bore the surname of his Indonesian father, Lolo Soetoro. Petitioner has received copies of the school registration, in which it clearly states Obama's name as "Barry Soetoro," and lists his citizenship as Indonesian. Obama's father is listed as Lolo Soetoro.

The registration of a child in the public schools in Jakarta, Indonesia was verified with the Government Records on file with the Governmental Agencies, to ensure the student is in fact an Indonesian citizen and the child is registered under their legal name. Indonesia was under strict rule and did not allow foreign students to attend their public schools.

Under Indonesian law, when a male acknowledges a child as his son, it deems the son — in this case Obama — to be an Indonesian State citizen. Constitution of Republic of Indonesia, Law No. 62 of 1958 Law No. 12 dated 1 Aug. 2006 concerning Citizenship of Republic of Indonesia; Law No. 9 dated 31 Mar. 1992 concerning Immigration Affairs and Indonesian Civil Code (Kitab Undang-undang Hukum Perdata) (KUHPer) (Burgerlijk Wetboek voor Indonesie).

Furthermore, under the Indonesian adoption law, once adopted by an Indonesian citizen, the adoption severs the child's relationship to the birth parents, and the adopted child is given the same status as a natural child. Indonesian Constitution, Article 2.

For these reasons, Obama, his parents and/or his guardian would have been required to file applications with the U. S. State Department and follow the legal procedures to become a naturalized citizen in the United States, when he returned from Indonesia. If Obama and/or his family failed to follow these procedures, then Obama is an illegal alien.

The Indonesian citizenship law was designed to prevent apatride (stateless) or bipatride (dual citizenship). Indonesian regulations recognize neither apatride nor bipatride citizenship.

In addition, since Indonesia did not allow dual citizenship, neither did the United States, and since Obama was a "natural" citizen of Indonesia, the United States would not step in or interfere with the laws of Indonesia. Hague Convention of 1930.

In or about 1971, Obama's mother sent Obama back to Hawaii. Obama was ten (10) years of age upon his return to Hawaii.

As a result of Obama's Indonesia "natural" citizenship status, there is absolutely no way Obama could have ever regained U.S. "natural born" status, if he in fact ever held such. Obama could have only become naturalized if the proper paperwork was filed with the U.S. State Department, in which case, Obama would have received a Certification of Citizenship.

Petitioner is informed, believes and thereon alleges Obama was never naturalized in the United

States after his return. Obama was ten (10) years old when he returned to Hawaii to live with his grandparents. Obama's mother did not return with him, and therefore, unable to apply for citizenship of Obama in the United States. If citizenship of Obama had ever been applied for, Obama would have a Certification of Citizenship.

C. Obama Traveled to Indonesia, Pakistan and India in 1981, when he was Twenty (20) Years Old on his Indonesian Passport

Obama traveled to Indonesia, Pakistan and Southern India in 1981. The relations between Pakistan and India were extremely tense and Pakistan was in turmoil and under martial law. The country was filled with Afghan refugees; and Pakistan's Islamist-leaning Interservices Intelligence Agency (ISI) had begun to provide arms to the

Afghan mujahideen and to assist the process of recruiting radicalized Muslim men--jihadists--from around the world to fight against the Soviet Union. Pakistan was so dangerous that it was on the State Department's travel ban list for U.S. Citizens. Non-Muslim visitors were not welcome unless sponsored by their embassy for official business. A Muslim citizen of Indonesia traveling on an Indonesian passport would have success entering Indonesia, Pakistan and India. Therefore, it is believed Obama traveled on his Indonesian passport entering the Countries. Indonesian passports require renewal every five (5) years. At the time of Obama's travels to Indonesia, Pakistan and India, Obama was twenty (20) years old. If Obama would have been a U.S. citizen, which we doubt, 8 USC §1481(a)(2) provides loss of nationality by native born citizens upon "taking an oath or making an affirmation or other

formal declaration of allegiance to a foreign state...after having attained the age of eighteen years", in violation of 8 U.S.C. §1401(a)(1).

In response to all the requests for Obama to produce proof of his citizenship, Obama allowed three different web sites, www.dailykos.com, www.fightthesmears.com and www.factcheck.org to post, on their web site an image of a Certification of Live Birth with Obama's name on it, an image purported to be Obama's birth certificate. The image placed on these web sites shows a Hawaiian document which is typically provided for children's births in Hawaii as "natural born", as well as births abroad which have been registered in Hawaii regardless of whether the citizenship status was "natural born" or "naturalized". Thus, the image did not prove Obama's citizenship status as a "natural born" United States Citizen. The images placed on

these three (3) web sites were later discovered to be altered and forged images.

The citizenship status of Defendant Obama is a critical issue, an issue which needs to be addressed and confirmed prior to any election of our United States President so as to uphold the eligibility requirements in Article II, Section I of the United States Constitution. If Defendant Obama's citizenship and his eligibility — or lack thereof — to serve as President of the United States is not confirmed prior to the Presidential election, and if Defendant Obama is elected and later found that he is not eligible to serve as the President of the United States, the consequences could provide long-term damage to America.

Moreover, if Defendant Obama is found not to be a "natural born" United States citizen and permitted to serve as President, it would allow

variances from our United States Constitution without due process of law. If this were to occur it would set precedence, and further variances from our United States Constitution would be allowed without due process of law; ultimately, all citizens of the United States would no longer enjoy the same protections secured by the United States Constitution.

It is imperative to immediately verify and confirm Defendant Obama's eligibility or lack thereof, to serve as President of the United States.

If Obama is found to be ineligible to serve as President of the United States, it is imperative to have his name removed from the ballot and remove his nomination urgently to afford the citizens of the United States to have a properly vetted and qualified Democratic candidate in which to cast their votes.

Citizens of the United States should never be left with questions regarding the eligibility or ineligibility of any Presidential candidate. If these issues are not dealt with urgently we are at grave risk of a Constitutional crisis in the United States of America.

HOW JUDGE SURRICK DECIDED THE ISSUES

The District Court reviewed the Defendants, the DNC, Obama and the FEC's Motions to Dismiss and issued his Memorandum and Order granting the Defendants Motions to Dismiss based on standing. The Court found "[A] voter fails to present an injury-in-fact when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate" quoting *Crist v. Comm'n on Presidential Debatest*, 262 F.3d at 193, 194 (2d Cir. 2001); *Jones v. Bush*, 122 F.Supp. 2d 713 (N.D. Tex. 2000) at 717 (holding that harm experienced by "Petitioner[s] *and*

all other American citizens" was too "undifferentiated and general nature" to confer standing on voters). "The alleged harm to voters stemming from a presidential candidate's failure to satisfy the eligibility requirement of the Natural Born Citizen Clause is not concrete or particularized enough to constitute an injury in fact sufficient to satisfy Article III standing. See *Hollander v. McCain*, 2008 U.S. Dist. LEXIS 56729 at *12 (noting that such harm "would adversely affect only the generalized interest of all citizens in the constitutional governance").

Moreover, Judge Surrick on P. 11, footnote 9 states "By contrast, Petitioner would have us derail the democratic process by invalidating a candidate for whom millions of people voted and who underwent excessive vetting during what was one of

the most hotly contested presidential primaries in living memory."

This statement is completely inaccurate and assumes facts not in evidence. The entire purpose of filing suit is because Obama has not been vetted; his qualifications and eligibility have not been verified. Although, American citizens have been questioning Obama's eligibility to serve as President of the United States, Obama and the DNC have failed and refused to prove and/or show his eligibility to serve as President of the United States. Petitioner as well as all citizens of the United States do not have a way to verify the qualifications and/or eligibility to run for and/or serve as the United States President, nor is there any United States Law or mention in the United States Constitution the process in which is to be conducted to ensure the qualifications and/or eligibility of Presidential candidates.

The Court's ruling failed to address the issues regarding the Request for Admissions deemed Admitted and Petitioner's Summary Judgment Motion.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. The Memorandum and Order of Judge Surrick Reflects Widespread Uncertainty over the Meaning of Standing, which this Court Alone Can Dispel.

The very essence of civil liberty, wrote Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. 137 (1803), certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. Against the backdrop of historical Supreme Court precedent beginning with *Marbury* and extending through *Sprint Communications Co. L.P. v. APCC Services Inc.*, __ U.S. __, 128 S.Ct. 2531 (2008), the better-

informed "test" for the injury-in-fact prong of the standing doctrine analysis more resembles a "sliding scale" of factors and variables operating as a function of the speculative nature and/or remoteness of the allegations. *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998); *Sprint Communications Co. L.P. v. APCC Services Inc.*, __ U.S. __, 128 S.Ct. 2531 (2008); *Friends of the Earth v. Laidlaw Environmental Services Inc.*, 528 U.S. 167, 184 (2000).

In *Morton*, this Court held that the environmentalist Petitioners had standing, as injury to "aesthetic and environmental well-being" was enough to adequately constitute personal "stake" and

injury in fact. 405 U.S. at 734. Subsequently, in *Hunt*, this Court held that despite a lack of personal "stake," an association has standing to bring suit so long as the interests in question are relevant to the organization's purpose and regardless of whether the claims asserted or relief requested involve the individual members of the organization. 432 U.S. at 343. Furthermore, in *Laidlaw*, a case stemming from noncompliance with the Clean Water Act, this Court noted the importance of a Petitioner's demonstration of standing but followed up by stating that "it is wrong to maintain that citizen Petitioners facing ongoing violations never have standing to seek civil penalties." 528 U.S. at 184. More recently, in *Akins*, this Court rendered a decision maintaining that individual voters' inability to obtain alleged public information met the injury in fact requirement, as it helped to ensure that the Court

will adjudicate "a concrete, living contest between adversaries." 524 U.S. at 21. Similarly and finally, in *APCC*, decided by this Court in June 2008, the conventional, "personal stake" approach promulgated in cases such as *Lujan* and Baker gave way to the idea that the "personal stake" requirement and the three requirements of standing — injury in fact, causation and redressibility — are "flip sides of the same coin" and are simply two different ways of ensuring that each case or controversy presents "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *APCC*, 128 S.Ct. at 2543.

The case at hand may lack the specificity of injury in fact required by Lujan, but the allegations from which the action arises are no more speculative or remote than the importance of environmental

aesthetics of *Morton* or the party disconnect evident in *Hunt*. The foundation of the claims presented by Mr. Berg, the will to avoid a certain constitutional crisis, certainly amount to a "personal stake," but in the case that this Court may deem otherwise, the underlying claims absolutely present the adversarial contest under which standing was found in the recent decisions in *Akins* and *APCC*.

Without a doubt, the Respondents will note that the premise behind *Akins* was the failure to obtain information, and will attempt to distinguish *APCC* because it involves standing in the context of contracts, assignors and assignees. However, Mr. Berg has indeed sought information vital to the election process put forth in the U.S. Constitution, and this Court in *APCC* stated that, apart from historical precedent for permitting suits by assignees under assignments for collection, "[i]n any event, we

find that the assignees before us satisfy the Article III standing requirements articulated in more recent decisions of this Court." Furthermore, this Court's treatment of the standing doctrine in *APCC* should be enough to show that the reasoning exhibited by the district court judge, grounded in *Lujan*, misperceives the three prongs of standing as enunciated just four months ago by this Court.

Therefore, because of the reasons stated above, because of the "sliding scale" nature of a "test" for injury in fact, because the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury, this Court should hold that Mr. Berg has standing to prosecute this action and reverse the decision from the district court which maintains otherwise.

B. The Memorandum and Order from the District Court are Incorrect. The Promises made by Obama and the DNC Clearly Fall Under Promissory Estoppel

Barack Obama and the DNC made promises to the Petitioner and to the American people, reasonably expecting — in fact, counting on the idea — that the promises would induce reliance, those promises induced the Petitioner to expend money and billable hours and the American public to donate more than $600 million to Obama's campaign, and injustice can only be avoided by adjudication in this Court.

A cause of action under promissory estoppel arises when a party relies to his detriment on the intentional or negligent representations of another party, so that in order to prevent the relying party from being harmed, the inducing party is estopped from showing that the facts are not as the relying

party understood them to be. *Thomas v. E.B. Jermyn Lodge No. 2*, 693 A.2d 974, 977 (Pa. Super. 1997) (citing *Rinehimer v. Luzerne County Community College*, 539 A.2d 1298, 1306 (Pa. Super.), app. denied, 555 A.2d 116 (1988)). Promissory estoppel is applied to enforce a promise which is not supported by a binding contract. *Carlson v. Arnot-Ogden Mem'l. Hosp.*, 918 F.2d 411, 416 (3d Cir. 1990) (holding promissory estoppel is unwarranted in light of court's finding that parties formed an enforceable contract); *Bosum Rho v.Vanguard OB/GYN Assocs., P.C.*, No.Civ.A.98-167, 1999 WL 228993, at *6 (E.D.Pa. Apr. 15, 1999).

With regard to the doctrine of promissory estoppel, it is manifested, and not actual, intent which is paramount. The question is not what Obama and the DNC actually intended, as Judge Surrick claimed in his Memorandum, but rather

what the Petitioner and the American public, as promises, were justified in understanding that intent to be. There is no sound reason to suffer the harms in question because the U.S. District Court, Eastern District of Pennsylvania incorrectly dismissed the Promissory Estoppel claim. Judge Surrick claimed the DNC's promises were not actually promises but instead of statement of intentions. Judge Surrick went on further claiming, "The 'promises' that Petitioner identifies arc statements of principle and intent in the political realm. They are not enforceable promises under contract law. Indeed, our political system could not function if every political message articulated by a campaign could bc characterized as a legally binding contact enforceable by individual voters. Of course, voters are free to vote out of office those politicians seen to have breached campaign promises and Federal courts, however, are not and

cannot be in the business of enforcing political rhetoric."

The DNC and Obama made promises in writing which were posted on their website to lure people to donate money based on their promises. The DNC named this document "Renewing America's Promise," which presents the 2008 Democratic National Platform. In this document, the DNC promises among other things "use technology to make government more transparent, accountable and inclusive," "maintain and restore our Constitution to its proper place in our government and return our Nation to the best traditions, including their commitment to government by law" and "work fully to protect and enforce the fundamental Constitutional right of every American vote — to ensure that the Constitution's promise is fully realized".

Obama placed on his website and stated on national television his promise to open and honest Government and his promise to truthfully answer any questions asked of him.

As a result of his detrimental reliance on these promises, Petitioner donated money and billable hours to Democratic Presidential candidates as well as the Democratic National Committee.

The DNC did in fact break promises by promoting an illegal candidate to run for and serve, if elected, as President of the United States, clearly in violation of the United States Constitution and in violation of their promise to enforce the fundamental Constitutional rights of every American voter. Furthermore, Obama has not answered, in an honest manner, questions about his citizenship. Moreover, Obama has breached his promise to uphold our Constitution; Obama is a Constitutional lawyer and

teacher and is well aware he is ineligible to serve as the United States President. This is hardly an example of being open and honest, this is hardly an example of open and honest government, and it is neither the way to uphold our United States Constitution, nor the Oath of Office taken by Obama.

C. The District Court Erred in Dismissing the Action for Lack of Jurisdiction and the Error was by no Means Harmless Beyond a Reasonable Doubt Because the Outcome Would have been Different Save for the Erroneous Dismissal.

The district court erred in dismissing the action on grounds that it was not one within the jurisdiction of the court, as it directly involved the construction and application of the United States Constitution, and such an error cannot be deemed harmless beyond a reasonable doubt as the outcome of the case would likely have been different save for

the erroneous dismissal. *Chapman v. California*, 386 U.S. 18, 24 (1967); Swafford v. Templeton, 185 U.S. 487, 491 (1902). While *Chapman* involved a case which arose from jury nullification and Fifth Amendment issues, this Court nonetheless placed emphasis on the intention of the harmless-error standard to not treat as harmless constitutional errors which affected the "substantial rights" of a party, and held that before a constitutional error may be deemed harmless, the Court must be capable of discerning that it was harmless beyond a reasonable doubt, and the burden of proof falls on the non-prejudiced party to do so. 386 U.S. at 24. Furthermore, in *Swafford*, this Court held that an action brought in federal court cannot be dismissed for want of jurisdiction, no matter the perceived lack of merit of the averments within, when the very heart of the controversy arises from a guideline put

forth by America's founders and guaranteed by the constitution and, therefore, is very much a federal question. 105 U.S. at 493.

In this case, citing the criteria put forth by this Court in *Chapman*, the district court's error in dismissing Mr. Berg's action for lack of proper jurisdiction must not be considered harmless beyond a reasonable doubt as, without the improper dismissal, the outcome of the case would have likely been different. Furthermore, considering the guidelines put forth by this Court in *Swafford* and the mere fact that Mr. Berg's allegations arise from Article II, Section 1 of the United States Constitution, the action improperly dismissed by the district court runs to the very heart of the requirements and guidelines and ideas and ideals put forth by the framers of America's founding documents and is, therefore, very much a federal

question and well within the jurisdiction of the district court.

For the aforementioned reasons, the district court's error in dismissing Mr. Berg's action on grounds of lack of jurisdiction was by no means harmless beyond a reasonable doubt. Therefore, this Court should reverse the decision rendered by the United States District Court for the Eastern District of Pennsylvania and here the merits of the case.

D. The District Court Erred in Holding Petitioner has not Suffered Injury in Fact and Will Continue to Suffer if an Ineligible Candidate is Elected and Allowed to Take the Office of the Presidency

Petitioner has been damaged financially for all monies donated, billable hours spent supporting the Democratic candidates, taxes paid by Petitioner which went to the Secret Service for their protection

of Obama for the past twenty-one (21) months and for the financial costs and time expended of this litigation, when Defendants could have very easily investigated, verified and obtained proof of Obama's eligibility to serve as President of the United States, if in fact he is eligible.

Petitioner has suffered damage to his reputation and discrimination as a result of attempting to protect his rights and verify the eligibility of Obama to serve as President of the United States. Petitioner has been repeatedly called a racist and verbally assaulted for bringing forward this lawsuit against Obama. Petitioner is not a racist and is a paid Life Member of the NAACP.

Petitioner has attempted to obtain the verification and proof requested herein by way of requests, filing this action, Request for Admissions and Request for Production of Documents served

upon Defendants September 15, 2008, the DNC and Obama never answered the Request for Admissions and they are therefore deemed admitted, Federal Rules of Civil Procedure, rule 36 and by Subpoenas served upon agencies who could supply the documentation to prove Obama's citizenship status. To date, Petitioner has not received anything.

Petitioner's rights guaranteed under the Liberty clause of the Fourteenth (14th) Amendment of the United States Constitution have already been violated. It has been announced in the main stream media that Obama's "briefing" has already begun into our National Secrets, our Nations Top Secrets, which Obama is not privy too and in violation of our National Security, as Obama is not a legal citizen of the United States. This has placed Petitioner and other citizens of the United States in grave danger. Petitioner's Liberty as guaranteed will further be

violated if Obama is allowed to be voted into and assume the position of President of the United States; Petitioner will be further damaged and is in serious jeopardy.

Petitioner is forced to live with the consequences if an ineligible candidate is elected and allowed to serve as President of the United States. It will alter the United States Constitution without proper due process of law. It will set precedence and further violations of our United States Constitution will continue without due process of law and our rights secured by the United States Constitution will no longer protect citizens of the United States.

CONCLUSION

For the above aforementioned reasons, the Petition for a Writ of Certiorari Before Judgment should be granted.

Dated: October 30, 2008

Respectfully submitted,

Philip J. Berg, Esquire
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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 08-4083

PHILIP J. BERG,:

Plaintiff,

v.

BARACK OBAMA, ET AL.

Defendant.

October 24, 2008

SURRICK, J.

MEMORANDUM & ORDER

Presently before the Court are the Motion of Defendant Democratic National Committee and Senator Barack Obama to Dismiss First Amended Complaint (Doc. No. 20) and the Defendant Federal Election Commission's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. No. 24). For the following reasons, the Defendants' Motions to Dismiss will be granted.

I. BACKGROUND

A. Procedural History

Philip J. Berg (hereinafter "Plaintiff") is an attorney who is representing himself in this matter. On August 21, 2008, just prior to the Democratic National Convention, Plaintiff filed a Complaint for Declaratory and Injunctive Relief (Doc. No. 1) and a

Motion For Temporary Restraining Order and for Expedited Discovery (Doc. No. 2 "TRO") against Barack Obama ("Obama"), the Democratic National Committee ("DNC"), the Federal Election Commission ("FEC"), and Does 1-50 Inclusive. The Complaint and request for TRO alleged that Obama is not eligible to run for the Office of President of the United States because he is not a "natural born citizen" as required by Article II, Section 1, Clause 4 of the United States Constitution (the "Natural Born Citizen Clause"). Plaintiff sought a TRO prohibiting Obama from running for President and enjoining the DNC from selecting Obama as the nominee. Plaintiff also sought declaratory and injunctive relief in the form of a declaration that Obama is ineligible to run for the office of President under the United States Constitution and a permanent injunction enjoining Obama from running for President and enjoining the DNC from making Obama the Democratic presidential nominee.

On August 22, 2008, a hearing was held on Plaintiff's Motion for Temporary Restraining Order.[1] At the conclusion of the hearing an Order was entered denying the Motion. (Doc. No. 4.)

On September 9, 2008, service of the summons and Complaint was made on Defendants Barack Obama and the DNC. (Doc. No. 7.) On September 12, 2008, service was made on Defendant FEC. (Doc. No. 9.) On September 24, 2008, a Motion to Dismiss was filed by Barack Obama and the DNC. (Doc. No. 12.) Plaintiff's

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[1] Defendants were not represented at the hearing. Plaintiff advised the Court that he had faxed a copy of the Complaint and Motion for Temporary Restraining Order as well as notice of the hearing to Defendants, but that he could not confirm that they had been received by Defendants. (Hr'g. Exs. P-1, P-2, & P-9.)

Response in Opposition to the Motion to Dismiss was filed on September 29, 2008. (Doc. No. 13.) On October 6, 2008, Plaintiff filed a Motion for Leave to File a First Amended Complaint. (Doc. No. 14.) Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint") was attached to the Motion. (Doc. No. 14-2.)[2] In addition to Defendants Barack Obama, the DNC,and the FEC, Plaintiff's Amended Complaint includes the following Defendants: the Secretary of the Commonwealth of Pennsylvania Department of State, Pedro A. Cortés; Secretary of the Commonwealth in his Official Capacity; Diane Feinstein, Chairman of the U.S. Senate Commission on Rules and Administration in her Official Capacity; U.S. Senate Commission on Rules and Administration; and Does 1-50 Inclusive. [3]On October 20, 2008, a Motion of Defendant Democratic National Committee and Senator Barack Obama to Dismiss First Amended Complaint was filed. (Doc. No. 20.) On October 21, 2008 Defendant Federal Election Commission's Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Federal Rule of Civil Procedure 12(b)(1) was filed. (Doc. No. 24.)

The Amended Complaint adds claims that were not included in the original Complaint. In addition to the claim that Obama is not a "natural born citizen" and is therefore not eligible to be President, Plaintiff alleges that the Defendants have deprived him of his

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[2] Federal Rule of Civil Procedure 15(a) provides that "a party may amend its pleading once as a matter of course . . . before being served with a responsive pleading." A motion to dismiss is not a responsive pleading. The motion seeking leave to amend was unnecessary. The Amended Complaint is deemed filed.

[3] As of this date, there is no indication in this record that any of these newly added Defendants have been served.

rights in violation of 42 U.S.C. § 1983, 42 U.S.C. § 1985, and 42 U.S.C. § 1986 (Counts Two, Three, & Four). The Amended Complaint also adds a Claim for Promissory Estoppel (Count Seven) and includes claims for violation of the Federal Election Campaign Act ("Campaign Act"), 2 U.S.C. § 437 (Count Five), violation of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (Count Six), and a Claim of Loss of Nationality under 8 U.S.C. § 1481(b) (Count Eight).[4]

B. Factual Background

The Amended Complaint alleges that Plaintiff is a life-long member of the Democratic Party (Doc. No. 14-2 ¶ 3) who fears that Defendant DNC's nomination of Defendant Obama as the Democratic Party's presidential nominee for the 2008 election will result in irreparable harm to Plaintiff and other "Democratic Americans." (*Id.* ¶ 7.) Obama cannot be a presidential nominee, Plaintiff contends, because Obama is not a "natural born citizen" of the United States and is therefore barred from holding the office of President by the Natural Born Citizen Clause.[5] (*Id.* ¶ 36.)

Plaintiff claims that if the evidence shows that Obama is not a natural born citizen, his nomination (and presumably his election to the Presidency if he

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[4] The claims in Counts Five, Six and Eight were not included as claims in Plaintiff's original Complaint; however, they did appear in Plaintiff's brief in opposition to the Motion to Dismiss (Doc. No. 13) as arguments in support of Plaintiff's standing to bring this lawsuit.

[5] The Natural Born Citizen Clause reads: "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . ." U.S. Const. art. II, § 1, cl. 5.

wins) will be null and void. (*Id.* ¶ 7.) Plaintiff asserts that Defendants' collective knowledge of this fact, or their failure to assist Plaintiff in obtaining information from Obama and the DNC, has deprived Plaintiff of "liberty, property, due process of law and equal protections of the laws," (*id.* ¶ 89), and has caused "significant disenfranchisement of the Democratic Party" generally (*id.* ¶ 173).

Various accounts, details, and ambiguities from Obama's childhood form the basis of Plaintiff's allegation that Obama is not a natural born citizen of the United States. To support his contention, Plaintiff cites sources as varied as the Rainbow Edition News Letter, (*id.* ¶ 39), and the television news tabloid *Inside Edition* (*id.* ¶ 45). These sources and others lead Plaintiff to conclude that Obama is either a citizen of his father's native Kenya, by birth there or through operation of U.S. law; or that Obama became a citizen of Indonesia by relinquishing his prior citizenship (American or Kenyan) when he moved there with his mother in 1967. Either way, in Plaintiff's opinion, Obama does not have the requisite qualifications for the Presidency that the Natural Born Citizen Clause mandates. The Amended Complaint alleges that Obama has actively covered up this information and that the other named Defendants are complicit in Obama's cover-up.

Plaintiff seeks the following relief from the Court:

1. An order compelling Defendants to turn over: (a) a certified copy of Obama's "vault" (original long version) birth certificate; (b) certified copies of all reissued and sealed birth certificates of Obama in the names referred to in the caption of this lawsuit; (c) a certified copy

of Obama's Certification of Citizenship; (d) a certified copy of Obama's Oath of Allegiance taken upon age of majority; (e) certified copies of Obama's admission forms for Occidental College, Columbia University and Harvard Law School; and (f) certified copies of any court orders or legal documents changing Obama's name from Barry Soetoro to Barack Hussein Obama;

2. A declaration that Obama is not a natural-born citizen or naturalized citizen of the United States;

3. A declaration that Obama is ineligible to run for the President under the United States Constitution, Article II, Section 1;

4. A preliminary and permanent injunction enjoining Obama from any further campaigning and from running for President;

5. An order compelling the FEC, Feinstein and the U.S. Senate Commission on Rules and Administration to immediately open and conduct an investigation into the fraudulent tactics of Obama and immediately open and conduct an investigation into the citizenship status of Obama; and

6. A preliminary and permanent injunction enjoining the DNC, the Pennsylvania Department of State, Pedro A. Cortés, Pennsylvania Secretary of the Commonwealth, and the Bureau of Commissions, Elections and Legislation from placing Obama's name on the presidential election ballot.

II. LEGAL STANDARD

A. Rule 12(b)(1) – Lack of Jurisdiction

Under Federal Rule of Civil Procedure 12(b)(1), a court must grant a motion to dismiss if it lacks subject matter jurisdiction over the case. Fed. R. Civ. P. 12(b)(1). The party asserting that jurisdiction is proper bears the burden of showing that jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1045 (3d Cir. 1993). A challenge to jurisdiction may be either factual or facial. *See CNA v. United States*, 535 F.3d 132, 145 (3d Cir. 2008) (*citing* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350, at 147-55 (3d ed. 2004)). Where the challenge is facial, as Obama and the DNC's is here, courts must take the well-pleaded facts of the complaint as true and must draw all inferences in a manner most favorable to the plaintiff, as with ruling on a Rule 12(b)(6) motion to dismiss. *See Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

B. Rule 12(b)(6) – Failure to State a Claim

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), this Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002). However, "a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion*

Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted).[6]

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[6] Obama and the DNC are the only Defendants that have moved this Court to dismiss under Rule 12(b)(6). (*See* Doc. No. 20.) However, we evaluate Plaintiff's claims against all Defendants. The Court "may on its own initiative dismiss the complaint for failure to state a claim upon which relief can be granted, pursuant to [Rule] 12(b)(6), where the inadequacy of the complaint is apparent as a matter of law." *Coggins v. Carpenter*, 468 F. Supp. 270, 279 (E.D. Pa. 1979) (*citing* 5 Wright and Miller, Federal Practice and Procedure § 1357). This practice "promotes the prompt and efficient disposition of cases and protects valuable judicial resources by expediting the dismissal of cases that lack 'a shred of a valid claim.'" *Pa. State Troopers Ass'n v. Pennsylvania*, No. 06-1079, 2007 WL 853958, at *9 (M.D. Pa. Mar. 20, 2007), *modified*, 2007 WL 1276914 (M.D. Pa. May 1, 2007) (*citing Baker v. U.S. Parole Comm'n*, 916 F.2d 725, 726 (D.C. Cir. 1990)). The court must accept all of a plaintiff's allegations as true, as we have done here. *See Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980). In addition, the court must give the plaintiff notice and an opportunity to be heard on the legal viability of his complaint. *See Dougherty v. Harper's Magazine Co.*, 537 F.2d 758, 761 (3d Cir. 1976); *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 765 (7th Cir. 2006); *see also Bethea v. Nation of Islam*, 248 Fed. Appx. 331, 333 (3d Cir. 2007) ("However, although disfavored, a . . . dismissal may stand even if the plaintiff is not provided notice and an opportunity to respond where it is clear that the plaintiff cannot prevail and that any amendment would be futile."). This notice and opportunity to be heard may be provided by the act of a single defendant who raises a defense applicable to all defendants. *See Pourghoraishi*, 449 F.3d at 765-66; *Coggins*, 468 F. Supp. at 279 (dismissing the complaint with respect to defendants who were not properly served, where other defendants had filed motion to dismiss pursuant to Rule 12(b)(6)). In the instant case, Plaintiff is on notice that Obama and the DNC raised a Rule 12(b)(6) defense applicable to all Defendants. (*See* Doc. No. 20 (discussing all counts of the Amended Complaint and alleging that "none of the additional counts contained in the Amended Complaint sets forth any viable federal cause of action").) Since the filing of the

Thus, both the 12(b)(1) and the 12(b)(6) challenges to the Amended Complaint raise strictly legal questions. For purposes of this opinion, we take as true the well-pleaded facts of the Amended Complaint.[7]

III. LEGAL ANALYSIS

A. Count One—The Natural Born Citizen Clause[8]

Defendants Obama and the DNC argue that Plaintiff does not have Article III standing to bring a challenge under the Natural Born Citizen Clause and that as a result this Court does not have jurisdiction to hear the case. That Article III "restricts the federal 'judicial Power' to the resolution of 'Cases' and 'Controversies'" is a "basic doctrinal principle." *Sprint Commc'ns. Co. v. APCC Servs.*, 128 S. Ct. 2531, 2535 (2008). The requirement that there be a case or controversy "is satisfied only where a plaintiff has standing." *Id.*

Standing can be a difficult concept for lawyers and non-lawyers alike. The doctrine was so vague that it

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Motion to Dismiss First Amended Complaint (Doc. No. 20), Plaintiff has filed five different Motions, including a Motion for Summary Judgment. (*See* Doc. Nos. 21, 22, 25, 26 & 27). We assume that if Plaintiff wished to respond to those issues raised in the Motion to Dismiss First Amended Complaint that he did not already address in his Response in Opposition to the initial Motion to Dismiss (Doc. No. 13) he would have done so.

[7] We note that while we take Plaintiff's allegations as true for purposes of this motion (as we must), Defendants Obama and DNC characterize them as "patently false." (Doc. No. 20 at 9.)

[8] Because we dispose of Count One on jurisdictional grounds, we need not address whether Plaintiff can state a claim for relief under the Natural Born Citizen Clause. *See Ibraimi v. Chertoff*, No. 07-3644 (DMC), 2008 U.S. Dist. LEXIS 61406, at *12 (D.N.J. Aug. 11, 2008).

led Justice Douglas to quip, "[g]eneralizations about standing to sue are largely worthless as such." *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 151 (1970). Judge Posner has framed the topic in the following way:

> [D]esire does not create standing. If you become indignant reading about a case of police brutality, you cannot sue the responsible officers in federal court under 42 U.S.C. § 1983, though the (immediate) victim might well have a suit; much less can you sue to force the state to conduct a referendum on police brutality, even if the referendum would alleviate your outrage at the officers' violation of federal civil rights law. If you happen to think it a scandal that less than half the eligible voters actually vote in most American elections, still you cannot sue the government demanding that it be ordered to punish nonvoters – and you could not even if, as in some other countries, the law required people to vote. The injury brought about by a violation of law must, to support a federal court action, be more direct and immediate than this. It must at least resemble the type of injury that would support a lawsuit under traditional principles of common law or equity; it must therefore affect one's possessions or bodily integrity or freedom of action, however expansively defined and not just one's opinions, aspirations, or ideology. It must in short be fairly describable as an injury personal to the plaintiff – a deprivation of his right – rather than a concern with another's injury.
>
> . . . .
>
> [I]f you have no right to demand assistance the failure to assist you is not an injury that will

> support a federal suit, even though such a failure may make the rights you do have, which include the right of political advocacy, less fruitful in achieving your goals.

People for Organized Welfare and Employment Rights v. Thompson, 727 F.2d 167, 171-72 (7th Cir. 1984) (Posner, J.) (citations omitted).

The Supreme Court has clarified the doctrine since Justice Douglas's time. It is now clear that standing is an "irreducible constitutional minimum" that has three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 290-91 (3d Cir. 2005) (employing *Lujan*'s three-pronged test). First, a party must have experienced an injury in fact: "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and quotation marks omitted). Second, there must be a causal connection between the injury in fact and the defendant's conduct that is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." *Id.* at 560-61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Third, a favorable decision must be likely to redress the complained of injury. *Lujan*, 504 U.S. at 561 (citations omitted). Where a plaintiff cannot establish each of the three elements, the plaintiff does not have standing and the court therefore does not have jurisdiction over the case and cannot rule on the merits. *See Goode v. City of Phila.*, 539 F.3d 311, 327 (3d Cir. 2008) ("[O]nce the District Court determined that [plaintiffs] did not have standing, it necessarily determined that it did not have ju-

risdiction and thus it could not decide the merits of the case.").

The Supreme Court has

> consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.

Lujan, 504 U.S. at 573-74. These decisions include the somewhat rare cases that have reached the Supreme Court where plaintiffs allege constitutional harms (other than taxpayer standing under the Establishment Clause of the First Amendment) that affect broadly-defined groups of citizens or voters. *See Lance v. Coffman*, 127 S. Ct. 1194, 1198 (2007) (per curiam) (holding that Colorado voters did not have standing under the Elections Clause of the Constitution, art. I, § 4, cl. 1, to challenge a provision of the Colorado constitution limiting the state's congressional redistricting to once per census); *Ex parte Levitt*, 302 U.S. 633, 633 (1937) (per curiam) (holding that a citizen did not have standing to challenge appointment of Hugo Black to the Supreme Court under the Constitution's Ineligibility Clause, art. I, § 6, cl. 2); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1976) (holding that an antiwar group did not have standing to invoke the Incompatibility Clause, art. II, § 6, cl. 2, to have members of Congress stricken from the Armed Forces Reserve List); *United States v. Richardson*, 418 U.S. 166, 179 (1974) (holding that a taxpayer did not have standing to obtain information about the expendi-

tures of the Central Intelligence Agency under the Constitution's Accounts Clause, art I, § 9, cl. 7).

Standing has been a consistent barrier to lower courts hearing generalized, undifferentiated claims by voters and citizens. *See Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 194 (2d Cir. 2001) (per curiam) (affirming trial court's determination that voter did not have standing to challenge policy of non-profit corporation responsible for organizing presidential debates); *Becker v. FEC*, 230 F.3d 381, 389-90 (1st Cir. 2000) (holding that supporters of presidential candidate Ralph Nader did not have standing to challenge FEC's debate regulations under which Nader experienced the alleged harm); *Gottlieb v. FEC*, 143 F.3d 618, 620-22 (D.C. Cir. 1998) (holding that voters, among others, did not have standing to challenge FEC's decision to dismiss an administrative complaint alleging violations of the Campaign Act); *Jones v. Bush*, 122 F. Supp. 2d 713, 716-18 (N.D. Tex. 2000) (holding that voters did not have standing to seek injunctive relief under the Twelfth Amendment to prevent Texas members of the Electoral College from casting votes for both George W. Bush and Dick Cheney).[9] Most recently, in a well-

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[9] This is not to say that voters never have standing to challenge practices that restrict their rights as voters. *See, e.g.*, *Bullock v. Carter*, 405 U.S. 134, 143-44 (1992) (allowing voters to intervene in suit challenging the constitutionality of prohibitively expensive filing fees that kept voters' desired candidates off the ballot where the fees in question had a "real and appreciable impact on the exercise of the franchise"). At first blush what concerned the Supreme Court in *Bullock* appears to be present here: Plaintiff argues that if Obama is permitted to run and is subsequently shown to be ineligible, voters will be denied their "right" to vote for an eligible candidate. (Doc. No. 13 at 17.) However, upon further review, it becomes apparent that there

reasoned and concise opinion, Judge Laplante of the District of New Hampshire ruled on a question very similar to the one before us and determined that voters do not have standing to bring a claim under the Natural Born Citizen Clause to exclude a candidate from the presidential primaries. *See Hollander v. McCain*, No. 08-0099, 2008 U.S. Dist. LEXIS 56729 (D.N.H. July 24, 2008).

1. Plaintiff Does Not Have Standing

"[A] voter fails to present an injury-in-fact when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate." *Crist*, 262 F.3d at 193; *Jones*, 122 F. Supp. 2d at 717 (holding that harm experienced by "Plaintiff[s] *and all other American citizens*" was too "undifferentiated and general nature" to confer standing on vot-

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are stark differences between Plaintiff's position and the position of the voters in *Bullock*.

In *Bullock*, the plaintiffs (both voters and aspiring candidates) challenged the constitutionality of filing fees whose expense kept aspiring candidates off the ballot. *Bullock*, 405 U.S. at 135. The Supreme Court held that the filing fees were an unconstitutional legislative barrier that kept otherwise legitimate, aspiring candidates from appearing on the ballot. Thus, state action, in the form of a statute, prevented voters from voting for legitimate candidates of their choice. That concern is not present here.

Moreover, the Court in *Bullock* did not limit or in any way invalidate votes that had already been cast; nor did it void the results of the elections that had taken place. *See id.* at 136- 37, 149 (affirming trial court's permanent injunction of the filing fee law). By contrast, Plaintiff would have us derail the democratic process by invalidating a candidate for whom millions of people voted and who underwent excessive vetting during what was one of the most hotly contested presidential primary in living memory.

ers) (emphasis in original). The alleged harm to voters stemming from a presidential candidate's failure to satisfy the eligibility requirements of the Natural Born Citizen Clause is not concrete or particularized enough to constitute an injury in fact sufficient to satisfy Article III standing. *See Hollander*, 2008 U.S. Dist. LEXIS 56729, at *12 (noting that such harm "would adversely affect only the generalized interest of all citizens in constitutional governance") (citations omitted).

Hollander and *Jones* are instructive. In *Hollander*, the plaintiff alleged that the Republican party primary candidate, John McCain,[10] was ineligible to be President because he was born in the Panama Canal Zone and, therefore, was not a "natural born citizen" as that term is used in the Natural Born Citizen Clause. *Hollander*, 2008 U.S. Dist. LEXIS 56729 at *2-9. The plaintiff believed that if the Republican National Committee were permitted to nominate McCain, and McCain were subsequently found ineligible to run for President, then plaintiff and "100 million additional voters" would be disenfranchised. *Id.* at *7-8. The district court ruled that the plaintiff did not have standing because the harm plaintiff alleged was too generalized. *Id.* at * 12.

In *Jones*, the plaintiffs alleged that George W. Bush and Dick Cheney were both inhabitants of Texas and that members of the Electoral College from Texas could not cast votes for both of them in the 2000 presidential election because of the Twelfth Amendment's requirement that Electors "shall . . . vote by ballot for President and Vice-President, one of

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[10] John McCain has since secured the Republican Party's nomination for President.

whom, at least, shall not be an inhabitant of that same state with themselves." *Jones*, 122 F. Supp. 2d at 715 (*quoting* U.S. Const. amend. XII). The plaintiffs claimed their status as voters was sufficient to confer standing. *Id.* According to the plaintiffs, by casting ballots for both Bush and Cheney, the Texas Electors would be "infringing [plaintiffs'] right to cast a meaningful vote." *Id.* at 717. The court found plaintiffs' alleged harm insufficient to establish standing because it was not a "particularized, palpable injury." *Id.*

Plaintiff's allegations of harm in the instant case suffer from the same fundamental flaws as the plaintiffs' allegations in *Hollander* and *Jones*: Plaintiff's stake is no greater and his status no more differentiated than that of millions of other voters. Plaintiff acknowledges as much in the Amended Complaint when he avers that he and "other Democratic Americans" (Doc. No. 14- 2 ¶ 7) will experience irreparable harm.[11] This harm is too vague and its effects too attenuated to confer standing on any and all voters. *See Becker*, 230 F.3d at 390 (holding that voter- plaintiffs' "concern for corruption of the political process 'is not only widely shared, but is also of an abstract and in-

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[11] One substantive problem with Plaintiff's disenfranchisement theory is that it is unlikely that "the removal of an elected official by non-electoral means amounts to 'disenfranchisement' of the voters who put him there." *Hollander*, 2008 U.S. Dist. LEXIS 56729, at *17 (*citing Powell v. McCormack*, 395 U.S. 486, 547 (1969)); *see also id.* at *18-*19 n.7 ("There is also the question of whether the 'disenfranchisement' resulting from a vote for an ineligible candidate is [a] sort of 'self-inflicted' harm caused by the voter, rather than any state actor, which therefore does not amount to an infringement of the franchise right." (*citing* 1 Lawrence H. Tribe, American Constitutional Law § 13-24, at 1122-23 (2d ed. 1988)).

definite nature,' comparable to the 'common concern for obedience to law'" (*quoting FEC v. Akins*, 524 U.S. 11, 23 (1998))).

The party asserting that jurisdiction is proper must establish each of the elements established by the Supreme Court in *Lujan*. 505 U.S. at 561 ("Since [elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, *each* element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof . . . .") (emphasis added). Failure to establish any of the elements leaves the plaintiff without standing. Plaintiff does not, and we believe cannot, establish an injury in fact. Therefore, he does not have standing to pursue this matter and we do not have jurisdiction to hear it.

2. Plaintiff's Standing Arguments are Unpersuasive

Plaintiff attempts to establish standing on several additional grounds, but his arguments do not solve the fundamental problem that the harm he alleges does not constitute an injury in fact. His most reasonable arguments attempt to distinguish *Hollander*. (Doc. No. 13 at 16-17.) For example, he asserts that the harm he has experienced is sufficient to constitute an injury in fact under *Akins* (*id.* at 18-22). However, Plaintiff ventures into the unreasonable with arguments based on a number of federal statutes (*id.* at 17-18, 22-27). We give consideration to each argument.

(a) Hollander v. McCain

In an effort to establish standing, Plaintiff attempts to distinguish *Hollander* on four grounds. First, he asserts that the plaintiff in *Hollander* chal-

lenged McCain's candidacy at the primary stage, and thus McCain's alleged ineligibility was "hardly a restriction on voters' rights." (*Id.* at 16.) By contrast, Plaintiff argues that Obama is now a candidate in the general election, which "prevents citizens from voting for Hillary Clinton despite her immense popularity." (*Id.* at 16-17.) Plaintiff is correct that the narrow issue in *Hollander* was the inclusion of an allegedly ineligible candidate in a primary field of multiple (presumptively) eligible candidates. *See* 2008 U.S. Dist. LEXIS 56729, at *13-14. Whereas a Republican in New Hampshire could vote for any one of twenty-one Republican candidates in the primary (*id.* at * 16 n.6), Plaintiff, as a life-long Democrat, arguably faces a Hobson's choice in the general election: Obama or nothing. Thus, we do not expect Plaintiff to take solace in the *Hollander* court's admonition that "McCain's candidacy for the presidency, whatever his eligibility, is 'hardly a restriction on voters' rights' because it in no way prevents them from voting for somebody else." *Id.* at * 14 (citation omitted).

That does not mean, however, that Plaintiff has experienced an injury in fact. The plaintiff and the court in *Hollander* specifically contemplated McCain winning his party's nomination:

> Unlike [plaintiff's] other "disenfranchisement" theory, this one does not depend on the failure of his chosen candidate *because of* McCain's alleged ineligibility, but on the success of [plaintiff's] chosen candidate – who is McCain in this scenario – *despite* his alleged ineligibility. On this theory, however, [plaintiff's] alleged "disenfranchisement" flows not from the actions he has challenged here, *i.e.*, McCain's presidential campaign or the RNC's likely selection of him as its

> nominee, but from his subsequent removal from office at the hands of someone else (presumably one of the co-equal branches), resulting (presumably, yet again) in a President different from the one [plaintiff] helped to elect.

Id. at * 17-18 (emphasis in original).[12] The court found that the plaintiff still could not meet the standing requirements on causation grounds; the harm experienced was not traceable to the defendants' conduct "but to the conduct of those – whoever they might turn out to be – responsible for ultimately ousting McCain from office." *Id.*

We agree that such causation considerations pose an impediment to a plaintiff obtaining standing in this context, but we also believe that, regardless of questions of causation, the grievance remains too generalized to establish the existence of an injury in fact. To reiterate: a candidate's ineligibility under the Natural Born Citizen Clause does not result in an injury in fact to voters.[13] *Cf. Lance*, 127 S. Ct. at 1198

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[12] Plaintiff's argument that Obama's nomination will deny him "the constitutional right to vote for an eligible candidate" is the same as the argument that the plaintiff made in *Hollander*. (Doc. No. 13 at 17.) The fact that the plaintiff in *Hollander* called the harm "disenfranchisement" and Plaintiff identifies it as a constitutional right to vote for an eligible candidate is a distinction without a difference. Indeed, Plaintiff does not appear to distinguish between the two terms. (*Compare* Doc. No. 13 at 17 *with* Doc. No. 14-2 ¶ 173 (alleging disenfranchisement will result from Obama's nomination and election).)

[13] We find Chief Justice Burger's observation in *Richardson* pertinent here:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of a particular individual or class to litigate these claims gives support to the argument that the subject mat-

(voters did not allege harm sufficient to invoke the Elections Clause); *Ex parte Levitt*, 302 U.S. 633, 633 (citizen could not articulate harm under the Ineligibility Clause). By extension, the theoretical constitutional harm experienced by voters does not change as the candidacy of an allegedly ineligible candidate progresses from the primaries to the general election.

Plaintiff's second attempt to distinguish *Hollander* folds into his first. He argues that because he is denied his constitutional right to vote for an eligible candidate, his harm is more particularized than the plaintiff's in *Hollander*. (*See* Doc. No. 13 at 17.) As we explained above, however, there is no meaningful distinction between the harm alleged here and the harm alleged in *Hollander*.

Plaintiff's third and fourth arguments are factual in nature. He argues that the harm created by Obama's ineligibility is a result of subterfuge and fraud by Obama as opposed to the situation in *Hollander* where there was no substantive dispute about where McCain was born. (*Id.*) He also claims that Defendants – presumably in their Motion to Dismiss – "have failed to show that Mr. Obama is 'unquestionably an American citizen.'" (*Id.* (*quoting Hollander*, 2008 U.S. Dist. LEXIS 56729, at *3).) These distinctions fail to take into account the procedural posture

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ter is committed to the surveillance of Congress, and ultimately to the political process.

418 U.S. at 179. If, through the political process, Congress determines that citizens, voters, or party members should police the Constitution's eligibility requirements for the Presidency, then it is free to pass laws conferring standing on individuals like Plaintiff. Until that time, voters do not have standing to bring the sort of challenge that Plaintiff attempts to bring in the Amended Complaint.

of the case here and in *Hollander*. We have taken Plaintiff's factual allegations as true and drawn all inferences in his favor. The court in *Hollander* operated under the same standard. *Hollander*, 2008 U.S. Dist. LEXIS 56729, at *2. Raising these factual discrepancies is unavailing to Plaintiff.

(b) Statutory standing arguments

Plaintiff also attempts to obtain standing to bring his Natural Born Citizen Clause claim under the Campaign Act, 2 U.S.C. § 431 *et seq.*; the Administrative Procedure Act ("APA"), 5 U.S.C. § 702; the Immigration and Nationality Act, 8 U.S.C. § 1481(b); FOIA, 5 U.S.C. § 552; 28 U.S.C. § 1343; and 28 U.S.C. § 1331. Plaintiff cites no authority under which any of these statutes would confer standing on him to bring his Natural Born Citizen Clause claim and we are aware of none. We therefore find that Plaintiff's attempt to use these statutes to gain standing to pursue his Natural Born Citizen Clause claim are frivolous and not worthy of discussion. Plaintiff avers violations of some of these statutes as freestanding causes of action in the Amended Complaint. We address the merit of those causes of action below.

B. Counts Two, Three, & Four – Civil Rights Violations, 42 U.S.C. § 1983, 42

U.S.C. § 1985, and 42 U.S.C. § 1986The Amended Complaint alleges deprivation of Plaintiff's civil rights in violation 42 U.S.C. § 1983 (Count Two), 42 U.S.C. § 1985 (Count Three), and 42 U.S.C. § 1986 (Count Four). The DNC and Obama argue that Plaintiff has failed to properly allege a deprivation of his constitutional or statutory rights by state action and has failed to properly allege a conspiracy. We address each of Plaintiff's claims in turn.

1. 42 U.S. C. § 1983

Plaintiff makes several allegations that he believes entitle him to § 1983 relief. First, he claims that he "has been deprived of money and billable hours by fraudulent means as a result of donating money and billable hours to secure, as promised, an eligible Democratic candidate for Office of the President . . . [and that he] has been deprived of his right to vote for an eligible Democratic Nominee for the U.S. Office of the President." (Doc. No. 14-2 ¶ 93.) Second, he claims that he has been a victim of racial animosity perpetrated by Obama's supporters, including being labeled in public as a racist for bringing this suit. (*Id.* ¶¶ 94-99.) Third, he claims that Defendants are "attempting to change our United States Constitution without proper due process of law by allowing Obama to continue his campaign . . . ." (*Id.* ¶ 100.) Fourth, he claims that his "Life, Liberty and Property rights guaranteed by the Fourteenth Amendment of the U.S. Constitution will further be violated if Obama is allowed to be voted into the position of President . . . ." (*Id.* ¶ 101.) Finally, he claims that all the Defendants (other than Obama) have damaged Plaintiff by failing to act in their official capacities to stop Obama from running. (*Id.* ¶¶ 104-08.)

> Section 1983 protects civil rights. It creates a cause of action against [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.

42 U.S.C. § 1983. A § 1983 claimant must allege violations of "rights independently 'secured by the Constitution and laws' of the United States." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002). "One cannot go into court and claim a 'violation of § 1983' – for § 1983 by itself does not protect anyone against anything." *Id.* (*citing Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979)). We therefore must inquire into whether Plaintiff has alleged a violation of a right that would entitle him to redress under § 1983.

The irreducible basis of all Plaintiff's alleged violations is that Obama might be elected to the Office of President despite being constitutionally ineligible under the Natural Born Citizen Clause. This alleged fact underscores his claim that he has been deprived of money and billable hours, his claim that he has been insulted in public, his claim that he is being deprived of a chance to vote for an eligible candidate, his claim that he will be deprived of life, liberty and property, and his claim that the non-Obama Defendants are causing him harm by not stopping Obama. The question, therefore, is straightforward: Does the Natural Born Citizen Clause create a federal right the violation of which results in a cognizable § 1983 claim? We think not.

After a diligent search, we have been unable to find any cases that address the matter and the parties have not offered any. However, other courts have addressed the application of § 1983 in analogous situations. *See, e.g.*, *Dennis v. Higgins*, 498 U.S. 439 (1991) ("The Supremacy Clause . . . is 'not a source of any federal rights'; rather, it '"secure[s]" federal rights by according them priority whenever they come in conflict with state law.'" (*citing Chapman*, 441 U.S. at

613)); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir.) (amended opinion), *cert. denied*, 479 U.S. 1060 (1987) ("[T]he Supremacy Clause, standing alone, secures federal rights only in the sense that it establishes federal-state priorities; it does not create individual rights, nor does it secure such rights within the meaning of 42 U.S.C.S. § 1983."); *Maryland Pest Control Ass'n. v. Montgomery County*, 884 F.2d 160 (4th Cir. 1989) (same); *Gerling Global Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803, 811 (9th Cir. 2004) (Graber, J., concurring) ("[T]he foreign affairs power, like the Supremacy Clause, creates no individual rights enforceable under 42 U.S.C. § 1983."). Like the Supremacy Clause and the foreign affairs powers, the Natural Born Citizen Clause does not confer an individual right on citizens or voters. Therefore, Plaintiff cannot state a cognizable § 1983 claim.[14]

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[14] State action is also a necessary element of a § 1983 claim. *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141-45 (3d Cir. 1994) (discussing state action requirement). While we do not need to reach this question because Plaintiff does not allege the violation of any legally protected right, we note that he would likely have difficulty showing that either Obama or the DNC are state actors or acting under color of law. We have found no cases where a presidential candidate has been treated as a state actor merely for running for office. To the contrary, the few cases that we have found suggest that presidential candidates are not state actors or engaged in state action for purposes of § 1983. *See, e.g., Fulani v. McAuliffe*, No. 04-6973, 2005 U.S. Dist. LEXIS 20400, at *17 (S.D.N.Y. Sept. 19, 2005) (dismissing § 1983 claim against defendants, including the DNC and 2004 presidential candidate John Kerry, because they were not "acting under color of state law"); *Riches v. Giambi*, No. 07-0623, 2008 U.S. Dist. LEXIS 53123, at *20 (N.D. Cal. Jan. 2, 2008) (dismissing § 1983 claim against 2008 Republican presidential candidate Mike Huckabee because he was a private individual).

2. 42 U.S. C. § 1985

The facts that Plaintiff alleges in support of his 42 U.S.C. § 1985 claim are substantively the same as the facts he alleges in support of his § 1983 claim.[15] (*See* Doc. No. 14-2 ¶¶110-22.) He believes that the Defendants are promoting and assisting Obama's candidacy knowing that Obama is ineligible to take office. Plaintiff avers that Defendants' conduct amounts to a conspiracy in violation of § 1985. He does not, however, indicate the sub-section of § 1985 on which he premises his claim.

As a preliminary matter, where there is no federal right that creates a basis for a § 1983 claim there is similarly no basis for a § 1985 claim. *See Escamilla v. Santa Ana*, 606 F. Supp. 928, 934 (C.D. Cal. 1985) (granting summary judgment to defendants on plain-

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The claim that the DNC is not a state actor or acting under color of state law in conducting a presidential campaign is slightly more ambiguous, but the more recent cases appear to conclude that the DNC is not a state actor. *See Larouche v. Fowler*, 152 F.3d 974, 990 (D.C. Cir. 1998) ("If a party must produce the nation's 'uncontested choice' for President of the United State to qualify as a state actor, the Democratic (or Republican) Party plainly does not qualify"). *But cf. Lynch v. Torquato*, 343 F.2d 370, 372 (3d Cir. 1965) ("The people, when engaged in primary and general elections for the selection of their representatives in government, may rationally be viewed as the 'state' in action, with the consequence that the organization and regulation of these enterprises must be such as accord each elector equal protection of the laws.").

[15] Plaintiff makes additional claims about Obama and his campaign "abus[ing] their position and the law for intimidation purposes to stop people from free speech when the speech includes criticism or questioning of Obama . . . ." (Doc. No. 14-2 ¶ 115.) The Amended Complaint makes no attempt to allege facts in support of these claims, which standing on their own are nothing more than conclusory allegations.

tiff's § 1985 and § 1986 claims where plaintiff could not establish a § 1983 claim); *Wiggins v. Hitchens*, 853 F. Supp. 505, 510 (D.D.C. 1994) ("There can be no recovery under section § 1985(3) absent a violation of a substantive federal right."). This alone stands as an impediment to Plaintiff stating a cognizable § 1985 claim.

Moreover, none of the § 1985 clauses apply here. Section 1985(1) deals with interference with officers of the United States, and Plaintiff has not alleged that he is an officer of the United States. *See Silo v. City of Phila.*, 593 F. Supp. 870, 873 (E.D. Pa. 1984). Section 1985(2) "creates a claim for conspiracy to intimidate witnesses, jurors, or parties in a federal case." *Id.* Plaintiff has made no allegations that would support such a claim. That leaves § 1985(3). A claim under § 1985(3) arises when:

> (1) two or more persons conspire to deprive any person of the equal protection of the law; (2) one or more of the conspirators performs or causes to be performed any overt act in furtherance of the conspiracy; and (3) that overt act injures the plaintiff in his person or property or deprives the plaintiff of any right or privilege of a citizen of the United States.

Barnes Found. v. Twp. ofLower Merion, 242 F.3d 151, 162 (3d Cir. 2001). In addition, § 1985(3) "requires allegation of 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. . . .'" *Silo*, 593 F. Supp. at 873 (*citing Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

We do not reach an analysis of the three elements of § 1985(3) because Plaintiff has made no allegations

that the purported conspiracy is motivated by racial animus.[16] Instead, the Amended Complaint is focused entirely on an alleged conspiracy to conceal Obama's true nationality. Therefore, Plaintiff cannot state a cognizable § 1985 claim.

3. 42 U.S.C. § 1986

It is well settled that "[a] plaintiff must establish a valid § 1985 claim in order to state a claim under § 1986." *Carrington v. City of Jersey City*, No. 06-5367, 2008 U.S. Dist. LEXIS 38808, at *19 (E.D. Pa. May 12, 2008) (*citing Clark v. Clabaugh*, 20 F.3d 1290 (3d Cir. 1994)). Since the Amended Complaint does not articulate a cognizable § 1985 claim, Plaintiff's § 1986 claim must fail as well.

C. Count Five – Campaign Act Claims, 2 U.S.C. § 431 et seq.

Count Five of the Amended Complaint alleges a violation of the Campaign Act. 2 U.S.C. § 431 *et seq*. Specifically, it alleges that "[t]he DNC, FEC, Feinstein and the U.S. Senate Commission on Rules and Administration" are aware of "Obama's illegal activities, encouraging racial tension, encouraging violence, his fraudulent campaigning, fraudulently attempting to secure the position of President of the United States." (Doc. No. 14-2 ¶ 139.) Despite this knowledge, these Defendants "have allowed Obama's illegal and fraudulent campaign, [through] which Obama has received in excess of $450 Million in do-

[16] We note that the Amended Complaint alleges that Obama's supporters have made racially charged remarks (*see* Doc. No. 14-2 ¶ 94) and that Obama "is furthering racial tension" (*see id.* ¶ 96), but there are no factual allegations whatsoever that tie any Defendant to any racially motivated tortious conduct of the sort § 1985 was intended to redress.

nations." (Doc. No. 14-2 ¶ 141.) Plaintiff argues that this entitles him to the information regarding Obama that he seeks in the Amended Complaint.

The Amended Complaint does not allege any facts regarding Plaintiff's attempts to obtain the information he seeks by means of the Campaign Act. However, Plaintiff's Opposition informs us that he "complained" to the FEC prior to instigating his current suit and that the FEC has "completely ignored" him. (Doc. No. 13 at 18.) Although Plaintiff alleged these facts in his Opposition and not in the Amended Complaint, in the interest of rendering a decision that addresses Plaintiff's arguments, we will construe the allegations in a light most favorable to Plaintiff and treat the Amended Complaint as if it had alleged that the FEC failed to act on an administrative complaint.

Congress has charged the FEC with administering the Campaign Act, 2 U.S.C. § 437c(b). "As commonly understood, the [Campaign Act] seeks to remedy any actual or perceived corruption of the political process . . . ." *Akins*, 524 U.S. at 14. The Campaign Act confers standing on "[a]ny person who believes a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred" to file an administrative complaint with the FEC. 2 U.S.C. § 437g(a)(1). When the FEC fails to act on an administrative complaint, as Plaintiff seems to argue here, a party may file a suit in district court.[17] 2 U.S.C. §

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[17] If we have extended Plaintiff too favorable an inference and he in fact did not file an administrative complaint, then he lacks standing to pursue the theory outlined in his Amended Complaint because section 437d(e) of the Campaign Act provides that "the power of the [FEC] to initiate civil actions . . . shall be *the exclusive* civil remedy for the enforcement of the provisions of this Act." 2 U.S.C. § 437d(e) (emphasis added). *See also*

437g(a)(8); *Stockman*, 138 F.3d at 153, 156 n.18 (5th Cir. 1998) (noting that § 478g(a)(8) is the only private remedy afforded by the Campaign Act). There are, however, two fatal flaws with Plaintiff's theory: one procedural and one substantive.

First, if the FEC failed to act on a complaint filed by Plaintiff, this is the wrong court to hear the action. The Campaign Act specifically requires that grievances regarding the FEC's failure to enforce the Act must be filed in the District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8); *Beam v. Gonzales*, 548 F. Supp. 2d 596, 611-12 (N.D. Ill. 2008) ("[T]he only FECA provision empowering private parties to seek judicial review extends to administrative complainants . . . . Even if such a suit were proper [here], FECA would require that it be brought in the United States District Court for the District of Columbia.").

Second, neither the Amended Complaint nor the Opposition identifies a specific provision of the Campaign Act that entitles Plaintiff to information concerning Obama's citizenship. Instead, Plaintiff relies on generalized arguments about political corruption and the purpose of the Campaign Act. (*See* Doc. No. 13 at 20-22.) Congress intended the Campaign Act to combat the corrupting influence of money on the political process. *See Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1281 (5th Cir. 1994) ("The primary purpose of [the Campaign Act] . . . is to regulate campaign contributions and expenditures in order to eliminate pernicious influence – actual or perceived – over candidates by those who contribute large sums .

Stockman, 138 F.3d at 152 ("The [Campaign Act] provides a strong basis for scrupulously respecting the grant by Congress of 'exclusive jurisdiction' to the FEC . . . .").

. . ." (footnote omitted)). It seems clear that the Campaign Act does not address the sort of corruption that Plaintiff alleges in his Complaint. Nevertheless, Plaintiff cites to the Supreme Court's decision in *Akins*, 524 U.S. 11 *passim*, to support his claim of standing. (*See* Doc. No. 13 at 20- 22.) Reliance on *Akins*, however, merely accentuates the problems with Plaintiff's argument.

Akins involved a challenge by voters to the FEC's determination that the American Israel Public Affairs Committee ("AIPAC") was not a "political committee" within the meaning of the Campaign Act. 524 U.S. at 13. The effect of this determination was to shield AIPAC from the Campaign Act's disclosure requirements and deprive plaintiffs of information regarding, among other things, AIPAC's lobbying activities. *Id.* at 15-16. On certiorari, the Supreme Court addressed whether the plaintiffs (respondents) had "standing to challenge the [FEC's] decision not to bring an enforcement action in this case." *Id.* at 18. In holding that the plaintiffs did have standing, the Court determined that "[t]he 'injury in fact' that [plaintiffs] have suffered consists of their inability to obtain information – lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures – that, on [plaintiffs'] view of the law, the statute requires that AIPAC make public." *Id.* at 21. Plaintiff reasons that he has standing because his request for information is analogous to the plaintiffs in *Akins*. (*See* Doc. No. 13 at 21-22.)

Plaintiff's argument has superficial appeal, but does not take into account the underlying consideration in *Akins* that was necessary to the Supreme Court's determination. There, plaintiffs sought dis-

closures that were required by the Campaign Act. *See Akins*, 524 U.S. at 16. Here, the Campaign Act does not require Defendants to disclose the sort of information that Plaintiff seeks in the Amended Complaint. Accordingly, even if Plaintiff had followed the proper administrative procedure, Plaintiff still would face an insurmountable obstacle to obtaining the information he now seeks through the courts. *See Gottlieb*, 143 F.3d at 620-21 (holding that voters did not have standing to challenge "supposed injury to their 'ability to influence the political process'" because such a claim was too vague to constitute an injury in fact – even where voters had followed the appropriate procedure under § 437g(a)(8)). If Congress had intended the Campaign Act to require presidential candidates to make public disclosures of the sort that Plaintiff requests here – and therefore expose candidates to legal challenges permitted by the broad grant of standing pursuant to § 437g(a)(1) of the Act – then it would have done so explicitly.

D. Count Six – Freedom of Information Act, 5 U.S.C. § 552 et seq.

In Count Six of the Amended Complaint, Plaintiff alleges violations of FOIA. 5 U. S.C. § 552 *et seq*. The gravamen of Plaintiff's allegation is that he "attempted to secure documents proving the citizenship status of Obama from Obama[,] the FEC, DNC, Feinstein, [and the] U.S. Senate, Commission on Rules and Administration," but "has been refused." (Doc. No. 14-2 ¶ 146.) Plaintiff's allegation fails to state a claim under FOIA for at least three reasons.

First, FOIA applies only to government agencies. Here, all but one of the Defendants are not government agencies as Congress has defined them. Under FOIA, "[e]ach agency shall make available for public

inspection and copying" certain government records. 5 U.S.C. § 552(a)(2). Congress defined the term "agency" under FOIA to include:

> any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Id. at § 552(f)(1) (emphasis added). Congress is not subject to FOIA. *Id.* at § 551(1) (noting that for purposes of FOIA, the term agency "does not include the Congress."). Defendants Obama, the DNC, Feinstein, and the U.S. Senate, Commission on Rules and Administration are not federal executive departments. *See id.* at § 552(f)(1). They are not independent regulatory agencies. *Id.* Indeed, they are not even in the executive branch. *Id.* Accordingly, Plaintiff cannot state a claim against them under FOIA.[18] *See, e.g.*,

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[18] Plaintiff does not assert that he "attempted to secure documents" under FOIA from Defendant Cortés, the Secretary of the Commonwealth of Pennsylvania. Even if he had, such an allegation would not state a claim. Defendant Cortés is an official of a Pennsylvania state agency. State agencies and officials are not subject to FOIA. *See Dunleavy v. New Jersey*, 251 Fed. App'x 80, 83 (3d Cir. 2007) (unpublished opinion) ("FOIA does not impose [an] obligation on state agencies."); *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999) ("[I]t is beyond question that FOIA applies only to federal and not to state agencies."); *Philip Morris, Inc., v. Harshbarger*, 122 F.3d 58, 83 (1st Cir. 1997) ("FOIA . . . applies only to federal executive branch agencies"); *Day v. Shalala*, 23 F.3d 1052, 1064 (6th Cir. 1994) (APA "pertains to federal agencies"); *Brown v. Kelly*, No. 93-5222, 1994 WL 36144, at *1 (D.C. Cir. Jan. 27, 1994) (per curiam) (FOIA does not apply to state agencies); *St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of "agency" under FOIA "does not en-

Sweetland v. Walters, 60 F.3d 852, 855 (D.C. Cir. 1995) (affirming dismissal of FOIA complaint where the plaintiff sought records from an entity that "was not an agency"); *St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (FOIA applies only to "agencies" as defined in 5 U.S.C. §§ 551(1) & 552(f)); *Citizens for Responsibility and Ethics in Wash. v. Office of Admin.*, 559 F. Supp. 2d 9, 19 (D.D.C. 2008) (granting motion to dismiss and finding that plaintiff failed to state a FOIA claim where defendant was not an agency under FOIA); *Aitro v. Clapper*, No. 05-3120, 2005 WL 1384063, at *2 (W.D. Mo. Jun. 8, 2005) ("As neither [entity] is a government agency, FOIA is inapplicable and Plaintiff has failed to state a claim . . . for which relief can be granted by this court.").

Second, FOIA requires a valid request for records, and Plaintiff does not allege that he made such a request from the FEC. The FEC is an independent regulatory agency, so it is subject to FOIA. FOIA "requires federal agencies to allow access to their records to any person who complies with the procedures set forth in the Act." *St. Mary Hosp. v. Phila. Prof. Standards Review Org., Inc.*, No. 78-2943, 1980 WL 19448, at *1 (E.D. Pa. June 25, 1980). However, Plaintiff does not allege that he complied with FEC guidelines regarding FOIA requests. *See generally* 11 C.F.R. § 4.7(b) (setting forth FEC guidelines for record requests under FOIA). It is entirely unclear from Plaintiff's Amended Complaint what type of request he actually made to the FEC. This alone warrants dismissal of the claim. *See, e.g.*, *Caraveo v. EEOC*, 96

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compass state agencies or bodies"); *Johnson v. Wells*, 566 F.2d 1016, 1018 (5th Cir. 1978) (state board of parole not agency within meaning of FOIA).

Fed. App'x 738, 2004 WL 608590, at *3 (2d Cir. Mar. 26, 2004) (unpublished opinion) (affirming dismissal of FOIA claim where Plaintiff "failed to allege that he complied with [agency] guidelines regarding FOIA requests."). Moreover, it is unclear when or if Plaintiff made his alleged FOIA request to the FEC. *See* 11 C.F.R. § 4.7(c) (establishing procedures and deadlines for the FEC to respond to FOIA requests). "Without any showing that the agency received the request, the agency has no obligation to respond to it." *Hutchins v. Dep't of Justice*, No. 00-2349, 2005 WL 1334941, at *1-2 (D.D.C. June 6, 2005).

Third, before bringing a FOIA claim in federal court, a plaintiff must exhaust the available administrative remedies. *See Wilbur v. CIA*, 355 F.3d 675, 676 (D.C. Cir. 2004) (per curiam) ("Exhaustion of administrative remedies is a mandatory prerequisite to a lawsuit under FOIA."); *McDonnell v. United States*, 4 F.3d 1227, 1240 (3d Cir. 1993) (holding that plaintiff had an obligation to pursue administrative remedies prior to filing suit). In addition, a plaintiff must allege in his complaint that "he exhausted his remedies under FOIA" in order to properly plead a case. *Scherer v. Balkema*, 840 F.2d 437, 443 (7th Cir. 1988) (*citing Hedley v. United States*, 594 F.2d 1043 (5th Cir. 1979)). Exhaustion allows "the agency [ ] an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." *Wilbur*, 355 F.3d 675, 677. "In the absence of such an allegation, [a plaintiff] states no claim upon which relief can be granted." *Scherer*, 840 F.2d at 443. Plaintiff alleges that the FEC has "ignored" his request. (Doc. No. 14-2 ¶ 146.) While FOIA "recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines," *Spannaus v. U.S. Dep't of*

Justice, 824 F.2d 52, 58 (D.C. Cir. 1987), Plaintiff does not allege expiration of any FOIA deadlines. Indeed, Plaintiff alleges no facts in his Amended Complaint that allow us to invoke the constructive exhaustion doctrine. Accordingly, Plaintiff's FOIA claim must be dismissed for this additional reason.

E. Count Seven – Promissory Estoppel

In Count Seven, Plaintiff brings a promissory estoppel claim against Obama and the DNC. (*See* Doc. No. 14-2 ¶¶ 153-79.) Plaintiff asserts that he has "donated money and billable hours to Democratic Presidential candidates as well as the Democratic National Committee." (*Id.* ¶ 154.) In support of his claim, Plaintiff alleges, among other things, that the DNC promised to (a) "'use technology to make government more transparent, accountable, and inclusive,'" (*id.* ¶ 159), (b) "maintain and restore our Constitution to its proper place in our government and return our Nation to the best traditions, including their commitment to government by law" (*id.* ¶ 161), and (c) "'work fully to protect and enforce the fundamental Constitutional right of every American vote – to ensure that the Constitution's promise is fully realized'" (*id.* ¶ 163). The source of these "promises" is a document titled "Renewing America's Promise," which presents the 2008 Democratic National Platform. Plaintiff alleges that the DNC breached these promises by (1) promoting an "illegal candidate" to serve as President; (2) failing to investigate Obama's citizenship; and (3) failing to provide "accurate information" about Obama's eligibility for presidential office. (*Id.* ¶¶ 162, 165.) Plaintiff also asserts that Obama "has promised to uphold the United States Constitution and to be open and honest with all questions presented." (*Id.* ¶ 167.) He claims that Obama

has violated both of these promises by refusing to provide proof of his citizenship status and by running for office even though "he is aware he is ineligible to serve as the Pressident [sic] of the United States." (*Id.* ¶ 167.) Plaintiff also claims that Obama has breached his promise to uphold the Constitution by committing massive voter fraud to the tune of more than $450 million. (*Id.*) Plaintiff concludes:

> All elements required to invoke Promissory Estoppel have been met by Plaintiff. The DNC and Obama made a promise to Plaintiff, which Plaintiff relied upon and expected. Not only has Plaintiff suffered economic losses; [sic] he has lost his constitutional right to vote for an eligible Democratic candidate who can serve as the President of the United States, if elected. The only way justice can be served is by the Court enforcing the promise of the DNC and Obama.

(*Id.* ¶¶ 177-78.)

Although Plaintiff does not specify the law on which he bases his claim, under any definition of promissory estoppel there must be an enforceable promise. *See, e.g.*, *168th & Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945, 955 (8th Cir. 2007) (finding, under Nebraska law, that "[p]romissory estoppel requires evidence that the promisor made a 'promise' to the promisee. A statement of opinion or future intent is insufficient to give rise to a promise"); *Garwood Packaging, Inc. v. Allen & Co.*, 378 F.3d 698, 702, 706 (7th Cir. 2004) (finding, under Indiana law, that "the promise relied on to trigger an estoppel must be definite in the sense of being clearly a promise and not just a statement of intentions" and that "if the statements are not reasonably understood as legally enforceable promises there can be no action

for promissory estoppel"); *DeVoll v. Burdick Painting*, 35 F.3d 408, 412 n.4 (9th Cir. 1994) (finding that, "[u]nder both California and federal common law, to establish an enforceable contract based on promissory estoppel, the promisee must show (1) the existence of a promise . . . ."); *Ankers jerne v. Schlumberger Ltd*, No. 03-3607, 2004 U.S. Dist. LEXIS 9927, at *13-14 (E.D. Pa. May 12, 2004) (finding that, under Pennsylvania law, "[a] broad and vague implied promise is not enough to satisfy" the promissory estoppel requirement that a promisor make a promise that he should reasonably expect will induce action or forbearance on the part of promisee) (*citing C & K Petroleum Prods., Inc. v. Equibank*, 839 F.2d 188, 192 (3d Cir. 1988), *aff'd* 155 Fed. Appx. 48 (3d Cir. 2005); *see also Minehan v. United States*, 75 Fed. Cl. 249, 260 (2007) (finding that "the IRS's mission statement ['to provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all'] is aspirational, and it makes no specific promise or offer which could be deemed the basis for a contract"); *Estate of Bogley v. United States*, 514 F.2d 1027, 1033 (Ct. Cl. 1975) (finding that the passing of a motion and adopting of a resolution by a corporation's board of directors did not constitute an offer or promise because "' [a] gratuitous and unsolicited statement of policy or of intention which receives the concurrence of the party to whom it is addressed, does not constitute a contract" (*quoting Goetz v. State Farm Mut. Auto. Ins. Co.*, 142 N.W. 2d 804, 807 (Wis. 1966))). The Restatement Second of Contracts provides that a "Promise Reasonably Inducing Action or Forbearance" is

> [a] promise which the promisor should reasonably expect to induce action or forbearance on the

> part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Restatement (Second) of Contracts § 90(1) (1981). The Restatement defines a promise as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement § 2(1).

The "promises" that Plaintiff identifies are statements of principle and intent in the political realm. They are not enforceable promises under contract law. Indeed, our political system could not function if every political message articulated by a campaign could be characterized as a legally binding contract enforceable by individual voters. Of course, voters are free to vote out of office those politicians seen to have breached campaign promises. Federal courts, however, are not and cannot be in the business of enforcing political rhetoric.

F. Count Eight – Immigration and Nationality Act, 8 U.S.C. § 1481(b)

In Count Eight of the Amended Complaint, Plaintiff alleges "loss of nationality" under an expatriation provision of the Immigration and Nationality Act, 8 U. S. C. § 1481(b). That provision provides:

> Whenever the loss of United States nationality is put in issue . . ., the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Any person who commits or performs . . . any act of expatriation . . . shall be presumed

> to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

8 U. S.C. § 1481(b). The provision establishes the burden of proof in expatriation proceedings where "nationality is put in issue." In such a case, the Act places the burden of proving loss of citizenship "upon the person or party claiming that such loss occurred." *Id.* The provision on which Plaintiff relies sets up rules of evidence; it does not establish a private cause of action. *See Vance v. Terrazas*, 444 U.S. 252, 265 (1980) (*citing* H.R. Rep. No. 1086, 87th Cong., 1st Sess., 41, U.S. Code Cong. & Admin. News, p. 2985 (1961) ("The provision 'sets up rules of evidence under which the burden of proof to establish loss of citizenship by preponderance of the evidence would rest upon the Government.'")). Because the provision does not establish a cause of action, Plaintiff fails to state a claim under 8 U.S. C. § 1481(b).

IV. CONCLUSION

For the foregoing reasons, we will grant Defendants' Motions to Dismiss. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

No. 08-4083
Civil Action

PHILIP J. BERG

Plaintiff,

v.

BARACK OBAMA, ET AL.

Defendant,

ORDER

AND NOW, this 24th day of October, 2008, upon consideration of the Motion of Defendant Democratic National Committee and Senator Barack Obama to Dismiss First Amended Complaint (Doc. No. 20) and the Defendant Federal Election Commission's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. No. 24), it is ORDERED that:

1. The Motion of Defendant Democratic National Committee and Senator Barack Obama to Dismiss First Amended Complaint (Doc. No. 20) is GRANTED;
2. Defendant Federal Election Commission's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. No. 24) is GRANTED; and
3. Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief is DISMISSED.

IT IS SO ORDERED.

BY THE COURT:

/s/ R. Barclay Surrick
R. Barclay Surrick *Judge*

FILED
NOV 03 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

116

No. (3) 08A391
08-570

In The Supreme Court of the United States

Philip J. Berg, Esquire,

Petitioner,

vs.

Barack Hussein Obama, Jr., *et al.*,

Respondents.

PETITIONER'S SUPPLEMENTAL ARGUMENT FOR APPLICATION FOR AN EMERGENCY TEMPORARY INJUNCTION PENDING RESOLUTION OF THE PETITION FOR WRIT OF CERTIORARI

To the Honorable David H. Souter, Justice of the United States and Circuit Justice for the Third Circuit:

NOW COMES the Petitioner, Philip J. Berg, Esquire, hereby submitting this Supplemental Argument in support of his Emergency Motion for an staying the Presidential Election of November 4, 2008, until resolution of the Petition for Writ of Certiorari Before Judgment. As grounds for this Application, Petitioner avers as follows:

I. REQUEST FOR EMERGENCY RELIEF

1. A Petition for Writ of Certiorari Before Judgment, pursuant to the U.S. Supreme Court Rules, specifically Rule 10 and Rule 11, was filed October 30, 2008 in this Court. Petitioner appealed from the United States Court of Appeals

for the Third Circuit from his appeal of the U.S. District Court, Eastern District of Pennsylvania Memorandum and Order dated October 24, 2008.

2. Petitioner filed an Application addressed to the Honorable David H. Souter for an Emergency temporary Injunction Staying the Election, which is November 4, 2008, until Petitioner's Writ of Certiorari filed with this Court is heard and resolved.

3. Petitioner filed for an emergency temporary Injunction to the Third Circuit Court of Appeals on October 30, 2008 (C.A. No. 08-4340) requesting a temporary injunction staying the Presidential election scheduled to take place November 4, 2008 until the issues on appeal with the Third Circuit are heard and/or resolved.

4. The Third Circuit Court of Appeals Justices Ambro and Jordon denied Petitioner's motion for an emergency temporary Injunction on October 31, 2008 claiming Petitioner did not have Standing. A true copy of Justice Ambro and Jordan's Order is attached hereto as **EXHIBIT "A".**

5. The standing issue is the reason for the Appeal.

A. The Standing Issue, which this Court Alone Can Dispel.

The very essence of civil liberty, wrote Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. 137 (1803), certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. Against the backdrop of historical Supreme Court precedent beginning with *Marbury* and extending through *Sprint Communications Co. L.P. v. APCC Services*

Inc., __ U.S. __, 128 S.Ct. 2531 (2008), the better-informed "test" for the injury-in-fact prong of the standing doctrine analysis more resembles a "sliding scale" of factors and variables operating as a function of the speculative nature and/or remoteness of the allegations. *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998); *Sprint Communications Co. L.P. v. APCC Services Inc.*, __ U.S. __, 128 S.Ct. 2531 (2008); *Friends of the Earth v. Laidlaw Environmental Services Inc.*, 528 U.S. 167, 184 (2000).

In *Morton*, this Court held that the environmentalist Petitioners had standing, as injury to "aesthetic and environmental well-being" was enough to adequately constitute personal "stake" and injury in fact. 405 U.S. at 734. Subsequently, in *Hunt*, this Court held that despite a lack of personal "stake," an association has standing to bring suit so long as the interests in question are relevant to the organization's purpose and regardless of whether the claims asserted or relief requested involve the individual members of the organization. 432 U.S. at 343. Furthermore, in *Laidlaw*, a case stemming from noncompliance with the Clean Water Act, this Court noted the importance of a Petitioner's demonstration of standing but followed up by stating that, "it is wrong to maintain that citizen Petitioners facing ongoing violations never have standing to seek civil penalties." 528 U.S. at 184. More recently, in *Akins*, this Court rendered a decision

maintaining that individual voters' inability to obtain alleged public information met the injury in fact requirement, as it helped to ensure that the Court will adjudicate "a concrete, living contest between adversaries." 524 U.S. at 21. Similarly and finally, in *APCC*, decided by this Court in June 2008, the conventional, "personal stake" approach promulgated in cases such as *Lujan* and Baker gave way to the idea that the "personal stake" requirement and the three requirements of standing — injury in fact, causation and redressibility — are "flip sides of the same coin" and are simply two different ways of ensuring that each case or controversy presents "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *APCC*, 128 S.Ct. at 2543.

The case at hand may lack the specificity of injury in fact required by Lujan, but the allegations from which the action arises are no more speculative or remote than the importance of environmental aesthetics of *Morton* or the party disconnect evident in *Hunt*. The foundation of the claims presented by Mr. Berg, the will to avoid a certain constitutional crisis, certainly amount to a "personal stake," but in the case that this Court may deem otherwise, the underlying claims absolutely present the adversarial contest under which standing was found in the recent decisions in *Akins* and *APCC*.

Without a doubt, the Respondents will note that the premise behind *Akins* was the failure to obtain information, and will attempt to distinguish *APCC* because it involves standing in the context of contracts, assignors and assignees. However,

Mr. Berg has indeed sought information vital to the election process put forth in the U.S. Constitution, and this Court in *APCC* stated that, apart from historical precedent for permitting suits by assignees under assignments for collection, "[i]n any event, we find that the assignees before us satisfy the Article III standing requirements articulated in more recent decisions of this Court." Furthermore, this Court's treatment of the standing doctrine in *APCC* should be enough to show that the reasoning exhibited by the district court judge, grounded in *Lujan*, misperceives the three prongs of standing as enunciated just four months ago by this Court.

Therefore, because of the reasons stated above, because of the "sliding scale" nature of a "test" for injury in fact, because the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury, this Court should hold that Mr. Berg has standing to prosecute this action.

B. A Case the District Court Cited in Denying Standing to Petitioner Supports Granting Petitioner's Motion Requesting a Temporary Injunction Staying the Presidential Election.

In *Jones v. Bush* , 122 F. Supp.2d 713 (N.D. Tex.), affirmed without opinion, 244 F.3d 134 (5th Cir. 2000), plaintiffs requested a preliminary injunction to prevent the Texas electors from casting their votes in favor of defendant candidates because of alleged violation of the Twelfth Amendment of the Constitution. The Court denied the request for injunctive relief because plaintiffs failed to demonstrate a substantial likelihood of success on the merits of their claim that the defendant Vice-Presidential candidate was an inhabitant of the state of Texas during the

relevant period. Id., at 715. On the basis of this case, the District Court Judge erred when he failed to consider the likelihood of success on the merits.

Further, in *Robinson v. Bowen*, 2008 U.S. Dist. LEXIS 82306 (N.D. Cal. Sept. 16, 2008) the plaintiff moved for an order to remove Senator McCain from the California ballot in November because he alleged that McCain was not a "natural born citizen" and was therefore ineligible to serve as President. The court reviewed the order and stated:

> "This order finds it highly probably, for the purposes of this motion for provisional relief, that Senator McCain is a natural born citizen. Plaintiff has not demonstrated the likelihood of success on the merits necessary to warrant the drastic remedy he seeks." Id., at *3.

In Petitioner's case herein, both the District Court and the Third Circuit Court of Appeals clearly erred in denying injunctive relief without reviewing the likelihood of success on the merits of the case. Further, based on overwhelming evidence that Obama is not a natural born citizen of the United States, Petitioner would likely succeed on the merits of the case and should be granted a temporary Injunction Staying the Presidential Election.

C. Defendants Obama and the DNC made promises that clearly Fall Under Promissory Estoppel

Barack Obama and the DNC made promises to the Petitioner and to the American people, reasonably expecting — in fact, counting on the idea — that the promises would induce reliance, those promises induced the Petitioner to expend money and billable hours and the American public to donate more than $600 million

to Obama's campaign, and injustice can only be avoided by adjudication in this Court.

A cause of action under promissory estoppel arises when a party relies to his detriment on the intentional or negligent representations of another party, so that in order to prevent the relying party from being harmed, the inducing party is estopped from showing that the facts are not as the relying party understood them to be. *Thomas v. E.B. Jermyn Lodge No. 2*, 693 A.2d 974, 977 (Pa. Super. 1997) (citing *Rinehimer v. Luzerne County Community College*, 539 A.2d 1298, 1306 (Pa. Super.), app. denied, 555 A.2d 116 (1988)). Promissory estoppel is applied to enforce a promise which is not supported by a binding contract. *Carlson v. Arnot-Ogden Mem'l. Hosp.*, 918 F.2d 411, 416 (3d Cir. 1990) (holding promissory estoppel is unwarranted in light of court's finding that parties formed an enforceable contract); *Bosum Rho v.Vanguard OB/GYN Assocs., P.C.*, No.Civ.A.98-167, 1999 WL 228993, at *6 (E.D.Pa. Apr. 15, 1999).

With regard to the doctrine of promissory estoppel, it is manifested, and not actual, intent which is paramount. The question is not what Obama and the DNC actually intended, as Judge Surrick claimed in his Memorandum, but rather what the Petitioner and the American public, as promises, were justified in understanding that intent to be. There is no sound reason to suffer the harms in question because the U.S. District Court, Eastern District of Pennsylvania incorrectly dismissed the Promissory Estoppel claim. Judge Surrick claimed the DNC's promises were not actually promises but instead of statement of intentions.

Judge Surrick went on further claiming, "The 'promises' that Petitioner identifies are statements of principle and intent in the political realm. They are not enforceable promises under contract law. Indeed, our political system could not function if every political message articulated by a campaign could be characterized as a legally binding contact enforceable by individual voters. Of course, voters are free to vote out of office those politicians seen to have breached campaign promises and Federal courts, however, are not and cannot be in the business of enforcing political rhetoric."

The DNC and Obama made promises in writing which were posted on their website to lure people to donate money based on their promises. The DNC named this document "Renewing America's Promise," which presents the 2008 Democratic National Platform. In this document, the DNC promises among other things "use technology to make government more transparent, accountable and inclusive," "maintain and restore our Constitution to its proper place in our government and return our Nation to the best traditions, including their commitment to government by law" and "work fully to protect and enforce the fundamental Constitutional right of every American vote — to ensure that the Constitution's promise is fully realized".

Obama placed on his website and stated on national television his promise to open and honest Government and his promise to truthfully answer any questions asked of him.

As a result of his detrimental reliance on these promises, Petitioner donated money and billable hours to Democratic Presidential candidates as well as the Democratic National Committee.

The DNC did in fact break promises by promoting an illegal candidate to run for and serve, if elected, as President of the United States, clearly in violation of the United States Constitution and in violation of their promise to enforce the fundamental Constitutional rights of every American voter. Furthermore, Obama has not answered, in an honest manner, questions about his citizenship. Moreover, Obama has breached his promise to uphold our Constitution; Obama is a Constitutional lawyer and teacher and is well aware he is ineligible to serve as the President of the United States. This is hardly an example of being open and honest, this is hardly an example of open and honest government, and it is neither the way to uphold our United States Constitution, nor the Oath of Office taken by Obama.

D. The District Court's Dismissal of the Action for Lack of Jurisdiction and the Error was by no Means Harmless Beyond a Reasonable Doubt Because the Outcome Would have been Different Save for the Erroneous Dismissal.

The district court erred in dismissing the action on grounds that it was not one within the jurisdiction of the court, as it directly involved the construction and application of the United States Constitution, and such an error cannot be deemed harmless beyond a reasonable doubt as the outcome of the case would likely have been different save for the erroneous dismissal. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Swafford v. Templeton*, 185 U.S. 487, 491 (1902). While *Chapman*

involved a case which arose from jury nullification and Fifth Amendment issues, this Court nonetheless placed emphasis on the intention of the harmless-error standard to not treat as harmless constitutional errors which affected the "substantial rights" of a party, and held that before a constitutional error may be deemed harmless, the Court must be capable of discerning that it was harmless beyond a reasonable doubt, and the burden of proof falls on the non-prejudiced party to do so. 386 U.S. at 24. Furthermore, in *Swafford*, this Court held that an action brought in federal court cannot be dismissed for want of jurisdiction, no matter the perceived lack of merit of the averments within, when the very heart of the controversy arises from a guideline put forth by America's founders and guaranteed by the constitution and, therefore, is very much a federal question. 105 U.S. at 493.

In this case, citing the criteria put forth by this Court in *Chapman*, the district court's error in dismissing Mr. Berg's action for lack of proper jurisdiction must not be considered harmless beyond a reasonable doubt as, without the improper dismissal, the outcome of the case would have likely been different. Furthermore, considering the guidelines put forth by this Court in *Swafford* and the mere fact that Mr. Berg's allegations arise from Article II, Section 1 of the United States Constitution, the action improperly dismissed by the district court runs to the very heart of the requirements and guidelines and ideas and ideals put forth by the framers of America's founding documents and is, therefore, very much a federal question and well within the jurisdiction of the district court.

For the aforementioned reasons, the district court's error in dismissing Mr. Berg's action on grounds of lack of jurisdiction was by no means harmless beyond a reasonable doubt. Therefore, this Court should reverse the decision rendered by the United States District Court for the Eastern District of Pennsylvania and here the merits of the case.

E. Petitioner as well as all United States Citizen Voters have Suffered Injury in Fact and Will Continue to Suffer if the Presidential Election is not Stayed Pending the Resolution of Obama's Citizenship and Eligibility to hold the Highest Officein the United States.

It is imperative the Presidential election on November 4, 2008 be stayed pending resolution of Obama's citizenship status and eligibility to hold the Office of President of the United States. The damage to Petitioner and all democratic voters will continue occurring if Obama is elected and allowed to take the position of President of the United States without any type of verification.

If Obama is elected as President of the United States and it is later discovered he is not a "natural born" and/or "natural" citizen of the United States, Petitioner and all Democratic citizen voters will be deprived of their right to cast their vote for a qualified and eligible candidate. Their votes will be deemed void if this occurs. Moreover, if Obama would prove his citizenship status, the Presidential election would continue on. However, Obama has refused. Obama is the only person who holds the power to resolve these issues, he is the only party who can access his birth records, but again he has refused. At this point, if Obama is forced to step down off the ballot, there is time for a qualified and eligible Democratic

candidate to fill the position. Thus, Petitioner and all Democratic Voters would have a party to cast their votes on.

Petitioner has been damaged financially for all monies donated, billable hours spent supporting the Democratic candidates, taxes paid by Petitioner that went to the Secret Service for their protection of Obama for the past twenty-one (21) months and for the financial costs and time expended for this litigation, when Defendants could have very easily investigated, verified and obtained proof of Obama's eligibility to serve as President of the United States, if in fact he is eligible.

Petitioner has suffered damage to his reputation and discrimination as a result of attempting to protect his rights and verify the eligibility of Obama to serve as President of the United States. Petitioner has been repeatedly called a racist and verbally assaulted for bringing forward this lawsuit against Obama. Petitioner is not a racist and in fact, is a paid Life Member of the NAACP.

Petitioner has attempted to obtain the verification and proof requested herein by way of Request for Admissions and Request for Production of Documents served upon Defendants and Subpoenas served upon agencies who could supply the documentation to prove Obama's citizenship status. To date, Petitioner has not received anything with the exception that on October 15, 2008, Obama and the DNC never answered or objected to the Request for Admissions and they are therefore deemed admitted pursuant to Federal Rules of Civil Procedure, Rule 36.

If Petitioner's Motion for Emergency temporary Injunction is denied and the election proceeds without adequate disclosure concerning Obama's citizenship status, Petitioner will have been deprived of information that is extremely important for voting and will suffer irreparable harm. In *Fec v. Akins*, 524 U.S. 11, 21 (1998), the Supreme Court held that if a party is denied information that will help in making a voting decision that party is obviously injured in fact. Defendants have failed to produce Obama's original vault birth certificate to prove Obama's citizenship status in the face of Petitioner's Discovery and even moved for a Protective Order to block such discovery requests. Since Petitioner cannot cast an informed and meaningful vote he has and will continue to suffer irreparable harm unless this Court grants an Emergency Restraining Order staying the election at least until such information is disclosed.

Petitioner's rights guaranteed under the Liberty clause of the Fourteenth (14th) Amendment of the United States Constitution have already been violated. It has been announced in the main stream media that Obama's "briefing" has already begun into our National Secrets, our Nations Top Secrets, which Obama is not privy too and in violation of our National Security, as Obama is not qualified and/or eligible to serve as President of the United States. This has placed Petitioner and other citizens of the United States in grave danger. Petitioner's Liberty as guaranteed will further be violated if Obama is allowed to be voted into and assume the position of President of the United States; Petitioner will be further damaged and is in serious jeopardy.

Petitioner is forced to live with the consequences if an ineligible candidate is elected and allowed to serve as President of the United States. It will alter the United States Constitution without proper due process of law. It will set precedence and further violations of our United States Constitution will continue without due process of law and our rights secured by the United States Constitution will no longer protect citizens of the United States.

Irreparable harm would likely flow from a denial of injunctive relief because a subsequently invalidated election is likely to be very disruptive. *Lucas v. Townsend*, 100 L. Ed. 2d 589 (1988). Therefore, Petitioner's Application for a temporary Injunction staying the Presidential Election set to take place November 4, 2008 should be granted.

F. CONCLUSION

For the above aforementioned reasons, Petitioner, Philip J. Berg, Esquire, prays this Honorable Court will grant his Application and issue a temporary Injunction staying the Presidential election.

Respectfully submitted,

Dated: November 3, 2008

Philip J. Berg, Esquire
Attorney in *Pro Se*
555 Andorra Glen Court, Suite 12
Lafayette Hill, PA 19444-2531
(610) 825-3134

No. 08-570

In The Supreme Court of the United States

Philip J. Berg, Esquire,

Petitioner,

vs.

Barack Hussein Obama, Jr., *et al.*,

Respondents.

CERTIFICATE OF SERVICE

I, Philip J. Berg, Esquire, hereby certify that Petitioner's Supplemental Argument in support of his Application to Justice David H. Souter, United States Supreme Court for the Third Circuit for a temporary Injunction staying the Presidential Election of November 4, 2008 pending the resolution of Petitioner's Writ of Certiorari was served upon the following Defendants via First Class Mail, postage fully prepaid, this 3rd day of November 2008.

Benjamin A. Streeter, III, Esquire
The Federal Election Commission (FEC)
999 E. Street, NW
Washington, D.C. 20463 In *Pro Se*

Secretary of the Commonwealth,
Pennsylvania Department of State,
Bureau of Commissions, Elections and Legislation
210 N. Office Building
Harrisburg, PA 17120 In *Pro Se*

CERTIFICATE OF SERVICE, Continued

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Attorney's for Defendant's
Barack Hussein Obama and
The Democratic National Committee

Pedro A. Cortés,
Secretary of the Commonwealth,
Pennsylvania Department of State,
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PA 17120

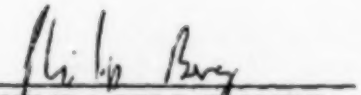
In *Pro Se*

The U.S. Senate, Commission on Rules and Administration
305 Russell Building, United States Senate
Washington D.C. 20510.

In *Pro Se*

Diane Feinstein,
Chairman of the U.S. Senate, Commission on Rules and Administration
305 Russell Building, United States Senate
Washington D.C. 20510

In *Pro Se*



PHILIP J. BERG, ESQUIRE
Attorney for Plaintiff
555 Andorra Glen Court, Suite 12
Lafayette Hill, PA 19444-2531
(610) 825-3134

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATIONS

I, Philip J. Berg, Esquire, Petitioner and a member of the Bar of this Court, certify that the Application for an Emergency temporary Injunction to Stay the Presidential Election pending resolution of the Petition for Writ of Certiorari contains 3,479 words excluding the parts of the Application that are exempted.

Dated: November 3, 2008

Philip J. Berg, Esquire
Attorney in *Pro Se*
555 Andorra Glen Court, Suite 12
Lafayette Hill, PA 19444-2531
(610) 825-3134

EXHIBIT "A"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 30, 2008
ECO-9

No. 08-4340

PHILIP J. BERG, Appellant

v.

BARACK HUSSEIN OBAMA, et al.

(E.D. Pa. No. 08-cv-4083)

PRESENT: **AMBRO** and **JORDAN**, Circuit Judges

1) Emergency Motion by Appellant Philip J. Berg for an Immediate Injunction To Stay the Presidential Election of November 4, 2008 Pending Resolution of the Petitioner's Appeal;

2) Response on behalf of Appellee Barack Obama with Exhibits to Appellant's Motion for Injunction To Stay the Presidential Election of November 4, 2008;

3) Response on behalf of Appellee Federal Election Commission with Exhibit to Motion for an Immediate Injunction To Stay the Presidential Election of November 4, 2008.

Carolyn Hicks, Case Manager
267-299-4926

ORDER

Plaintiff-Appellant's Emergency Motion for an Immediate Injunction To Stay the Presidential Election of November 4, 2008 Pending Resolution of the Petitioner's Appeal is hereby

(Continued)

ORDER

DENIED. For the reasons ably expressed by the District Court—and not addressed in Plaintiff-Appellant's Emergency Motion—it appears that Plaintiff-Appellant lacks standing to challenge Senator Barack Obama's candidacy for the Presidency of the United States. Accordingly, Plaintiff-Appellant has not shown a likelihood of success with respect to his appeal.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: October 31, 2008

cc: Philip Berg, Esq.
John P. Lavelle, Jr., Esq.
Benjamin A. Streeter, III, Esq.

Supreme Court, U.S.
MOTION FILED

DEC - 1 2008

William K. Suter,
Clerk

No. 08-576

In The

Supreme Court of the United States

PHILIP J. BERG,

Petitioner,

v.

BARACK OBAMA, et al.,

Respondents.

On Petition For A Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Third Circuit

MOTION TO FILE A BRIEF *AMICUS CURIAE* AND MOTION FOR WAIVER OF RULE 37(2)(A) OF THIS COURT OF BILL ANDERSON AND BRIEF *AMICUS CURIAE* OF BILL ANDERSON AND APPENDIX

In Support Of The Petitioner

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND MOTION FOR WAIVER OF RULE 37(2)(A) OF THIS COURT

I. Motion For Leave To File A Brief *Amicus Curiae*

The Court's *amicus*, Bill Anderson, requests leave of this Court to file a brief *amicus curiae* in this case. Consent to file it has been obtained from the petitioner, whom this brief supports; the respondents have not granted consent.

The *amicus* is a citizen of the State of Arizona and an elector of that state for elector for President of the United States. He voted in the general election held by the State of Arizona on November 4, 2008. This Court has in fact recognized that the *amicus* has an interest in this type of case. See *United States v. Newman*, 238 U.S. 537, 547, 35 S.Ct. 881, 883, 59 L.Ed. 1446, 1450 (1915); and the same holds true for the petitioner. *Ibid.*

Your *amicus* submits that it will not be possible for this Court to dispose of this case properly without considering the following points which either have not been brought to the attention of this Court by the parties or which have not been adequately discussed:

1.) This Court is not facing a question of the constitutional aspects of standing, but a question pertaining to the prudential considerations only; and,

2.) The lack of an adequate remedy following the inauguration of Barack Obama,

and the potential civil and military crises which could arise therefrom, crises that could not be readily addressed by the ordinary processes of the law, must be considered in addressing the prudential aspects of standing; and,

3.) With respect to the prudential considerations of standing, certain aspects of this case are analogous to the doctrine of *res ipsa loquitur*.

MOTION FOR WAIVER OF RULE 37(2)(A) OF THIS COURT

With respect to Rule 37(2)(a) of this Court, requiring notice to all parties at least ten days prior to filing an *amicus* brief, the *amicus* requests waiver of that Rule on the grounds that the point stated above concerning the aspect of this case which is analogous to *res ipsa loquitur* did not occur to counsel for the *amicus* at all until November 24, 2008; the *amicus* would not have sought to file this brief without that argument because counsel is of the opinion that that point is of such importance to this Court's full consideration of this case and to addressing the needs of justice that it justifies a waiver of this Court's rule. In the alternative, the *amicus* requests that this Court at least accept Argument II B. of this brief, which deals specifically with that point. (The other arguments deal with matters counsel had previously

considered bringing to this Court's attention if an *amicus* brief were to be filed at all.)

Following the research on Argument II B. and the drafting of the brief, and following the granting of consent by the petitioner to file this brief, counsel for the *amicus* sent a copy of the brief (including the cover, Table Of Contents, Table Of Authorities, motion for leave to file and motion for a waiver of Rule 37(2)(b), the text of the brief, and the appendix) by fax to the following persons at the fax numbers given:

1.) For respondents Barack Obama, the Democratic National Committee, and the Federal Election Commission: Gregory G. Garre, (202) 307-4613; and,

2.) For respondents Diane Feinstein and the Rules and Administration Committee of the United States Senate: "Counsel for Diane Feinstein and the Rules and Administration Committee," (202) 228-3954. Note: the office of the Rules and Administration Committee was closed when I called about 11:00 A.M. (1:00 P.M. in Washington), but Diane Feinstein is the Chair of that committee; and,

3.) For respondent Pedro A. Cortes, Secretary of the Commonwealth of Pennsylvania: "Counsel for Pedro A. Cortes," (717) 787-1734.

All three of these faxed transmissions were made between 11:45 A.M. and 12:45 P.M. Mountain

Standard Time on November 26, 2008. Immediately prior to sending the above faxes, I contacted the office of Gregory G. Garre by telephone and told the person who answered that I was sending the brief by fax; the other parties did not participate in the lower courts. An affidavit stating the relevant circumstances set forth in this motion (including the sending of these faxes) will accompany the filing of this brief and motion.

Wherefore, the *amicus* requests a waiver of Rule 37(2)(a) of this Court and for leave of this Court to file a brief *amicus curiae* in support of the petitioner either *in toto* or subject to such restrictions as this Court may deem proper.

Respectfully submitted,

LAWRENCE J. JOYCE
Counsel of Record

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INTEREST OF THE *AMICUS*

The Court's *amicus*, Bill Anderson, is a citizen of the State of Arizona and an elector of that state for elector for President of the United States.[1] He voted in the general election held by the State of Arizona on November 4, 2008. This Court has in fact recognized that the *amicus* has an interest in this type of case. See *United States v. Newman*, 238 U.S. 537, 547, 35 S.Ct. 881, 883, 59 L.Ed. 1446, 1450 (1915); the same holds true for the petitioner. *Ibid.* Consent to file this brief has been obtained from the petitioner, whom this brief supports; the respondents have not granted consent. The *amicus* seeks to file this brief by motion.

SUMMARY OF ARGUMENTS

1.) Since this Court has already recognized that the petitioner has an interest in this type of case, the limits of standing for this petitioner are based not on constitutional considerations, but on prudential considerations only.

2.) The lack of a practical remedy following inauguration may present an unprecedented constitutional crisis with civil and military implications,

[1] Counsel of record on this brief is the sole author of this brief. No person or entity, other than the *amicus* or counsel thereof, made a monetary contribution to the preparation or submission of the brief.

implications not readily addressed by the ordinary processes of law.

3.) The prudential elements should also be considered in light of how the instant case is analogous to the circumstances in which courts apply the doctrine of *res ipsa loquitur*.

ARGUMENTS

I. The Petitioner Meets The Constitutional Element Of Standing

The petitioner meets the constitutional element of standing:

> "In a sense – in a very important sense – every citizen and every taxpayer is interested in . . . having only qualified officers execute the law."

United States v. Newman, 238 U.S. 537, 547, 35 S.Ct. 881, 883, 59 L.Ed. 1446, 1450 (1915).

This Court has made the following statement as well,

> "Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requirements are met."

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80-81, 98 S.Ct. 2620, 2634, 57 L.Ed.2d 595, 616 (1978) (citation omitted).

II. The Prudential Limits On Standing Must Be Considered In Light Of The Following Issues

A. There Is No Adequate And Satisfactory Remedy Following Inauguration

Following respondent Obama's inauguration, the only way to attack his status as *de facto* President of the United States would be through *quo warranto* or by collateral attack. With respect to *quo warranto*, this Court said in *Newman* that an interest such as this petitioner does have,

> "... is to be represented by the Attorney General or the district attorney, who are expected by themselves or those they authorize to institute quo warranto proceedings against usurpers in the same way that they are expected to institute proceedings against any other violator of the law."

Newman, 238 U.S., at 547, 35 S.Ct., at 883, 59 L.Ed., at 1450.

In 1984 the United States Court of Appeals for the District of Columbia Circuit recognized that there are times when relying on the Attorney General to perform his obligations faithfully concerning *quo warranto* can be an absurdity. The Court said,

> "[T]he Attorney General was responsible for appointing appellees Diegelman and Lauer to their jobs. Requiring appellants to convince the Attorney General to file a *quo warranto* action on their behalf in this case would effectively bar their access to court."

Andrade v. Lauer, 729 F.2d 1475, 1498 (D.C. Cir. 1984).

In *Andrade*, the D.C. Circuit had already recognized the standing of the plaintiffs on other grounds, and noted that the practical lack of the remedy of *quo warranto* enhanced the need for granting injunctive relief. *Ibid.* If *quo warranto* were to be brought after respondent Obama is sworn in, it would have to be brought by the Attorney General or a U.S. attorney, or perhaps by the Vice-President of the United States.[2]

In light of that, we ask this Court to note the reasoning of the D.C. Circuit, and we ask this Court to find that the practical lack of *quo warranto* after respondent Obama may be sworn in not only enhances the need for injunctive relief for someone who does have standing, but also goes farther, and militates in favor of recognizing the petitioner's standing per se in the instant case.

With respect to collateral attacks on a *de facto* officer, this Court has noted that the usual rule is

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[2] See the Appendix for the current statutory provision on *quo warranto*, which is brought by the Attorney General, a United States attorney, or an "interested person."

that the official acts of a *de facto* officer are equally valid as those as a *de jure* officer. *Ryder v. United States*, 515 U.S. 177, 180-182, 115 S.Ct. 2031, 2034-2035, 132 L.Ed.2d 136, 142-143 (1995). More recently, however, this Court, in another case, first took note of its holding in *Ryder* and then held nonetheless that certain criminal convictions had to be vacated on the grounds that there was a constitutional defect in the authority of someone appointed to hear the appeals thereof. *Nguyen v. United States*, 539 U.S. 69, 77-81, 123 S.Ct. 2130, 2135-2137, 156 L.Ed.2d 64, 75-78 (2003).

Where does that leave us with respect to the validity of the official acts of a *de facto* President of the United States? No one knows. But this Court will surely see the test of that question if respondent Obama is sworn in as President. More damage will be done if this Court waits only until then to decide the question, and the reliance of the citizenry on the valid status of Obama as President of the United States, and the valid status of his act, will certainly be greater then than they are now.

A collateral attack on the status of respondent Obama after he has been sworn in might be thought of, academically, as being an adequate remedy, if ultimately that remedy should even prove to be available at all. But it is hardly a satisfactory remedy.

Would recognizing the standing of the petitioner in the instant case mean that anyone else could bring suit under just any circumstances in future cases?

No. These circumstances are unique. The hour is extremely late, and as a practical matter, other cases on this matter of exceptional national importance might not come before this Court in a timely manner, thereby necessitating this Court's allowing the petitioner to bring this case now in order to prevent nothing less than a possible national catastrophe and a constitutional crisis of unprecedented magnitude, a crisis not otherwise manageable by the ordinary operations of law.

Respondent Obama could, for instance, be blackmailed by anyone possessing *prima facie* evidence that he is not a natural-born citizen of the United States, just to give one example. And military officers, sworn to defend the Constitution against all enemies, both foreign and domestic, must not be placed in a situation in which they cannot say with absolute certainty whether the person claiming to be the Commander-in-Chief legitimately holds office or not, for another.

Are such questions to be left hanging in the balance when the moment comes – God forbid – to decide whether to use America's nuclear arsenal? In that moment, will our military leaders consider Barack Obama to be the Commander-in-Chief, or a "foreign enemy" of the Constitution? Do they dare speak up beforehand? Are these questions to be decided by justices of this Court who were appointed by Barack Obama, if even by this Court at all? Are not the status and reputation of this Court at stake?

In that light, we ask this Court to consider another point it made in *Duke Power*,

> "The prudential considerations embodied in the ripeness doctrine also argue strongly for a prompt resolution of the claims presented. . . . [D]elayed resolution of these issues would foreclose any relief from the present injury suffered . . . "

Duke Power, 438 U.S., at 81-82, 98 S.Ct., at 2635, 57 L.Ed.2d, at 616.

In saying all this, we do not hide from the fact that the fallout from this Court's merely granting certiorari (let alone any relief) will be tremendous. But this is hardly the fault of this Court. To begin with, the Constitution itself does not even envision the names of the ultimate candidates for President even being on the ballot, but instead only the names of the candidates for elector, who are left free to choose for whom they should vote. Thus, one would not even expect to find a provision in the Constitution requiring that someone being voted on for President by the electors would first have to affirmatively prove his eligibility to anybody.

The states, however, could have provided by statute that in order for the name of a political party's candidate to appear on the ballot, that candidate would have to provide affirmative proof of his qualifications. And Congress could have acted to require that in order to count a vote of an elector for a particular person, there would first have to be affirmative proof

that the person for whom the elector voted is in fact qualified to hold office. But the legislative bodies did not act. The onus is on them, therefore, to explain to an astonished and outraged citizenry just exactly how things could have gotten this far. This Court certainly could not reach out in anticipatory manner and try to adjudicate this issue prior to its being brought before the Court. The Court must simply do its duty; and in doing so, it simply has no authority or discretion to do more than just that.

This will hardly leave us in a constitutional crisis of our own making, however. The Constitution provides that if no person receives a majority of the votes of the Electoral College, the President is to be elected by the House of Representatives, and it also provides as to who, by provision of congressional statute, shall hold the office of President until someone qualifies for that office even if the office of Vice-President is vacant and no one qualifies to be President by the time the outgoing President leaves office.[3] (In the present case, if the House cannot decide on a President even by January 20, 2009, there would then be a vacancy in the office of President, and that vacancy would be filled by incoming Vice-President, presumably Joseph Biden. Our constitutional form of government will continue intact.) Given the fact that political parties had not yet ascended in American politics, the framers of the Constitution probably thought that this

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[3] U.S. Const. art. II, § 1, cl. 3 and cl. 6.

method would be used at least as often as by selecting the President in the Electoral College, if not in fact even more often.

Furthermore, Barack Obama is a Democrat. And in the incoming Congress, the delegation of more than twenty-five states in the House of Representatives will consist of a majority of members of the Democratic Party.[4] Voting for President of the United States in the House of Representatives is done by individual states.[5] (Accordingly, there would be fifty votes total at present in the House for President.) Therefore, if, by action of this Court, Barack Obama does not receive a majority of the vote of the Electoral College, if respondent Obama can then produce a hard copy of a valid Certificate of Live Birth from the State of Hawaii to show to the members of the House, and if he can likewise answer other lingering questions about his citizenship, there is certainly no reason to think that the members of his own party would deny him their votes for President in the House of Representatives. But if he cannot explain, to the satisfaction of the world, by January 20, 2009, why and how it is that he was at birth, and now remains, a natural-born citizen of the United States, then what in the world is wrong with denying him a majority vote in the Electoral College now anyway?

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[4] http://news.yahoo.com/election/2008/dashboard/?d=ST

[5] U.S. Const. art. II, § 1, cl. 3.

B. This Case Presents An Issue Analogous To The Doctrine Of *Res Ipsa Loquitur*

As we may recall from law school, in 1863 a man was walking down the street, approaching a business where a barrel was being hoisted up from a cart and over the sidewalk into a building. The man walked under the barrel, and the next thing he knew, he woke up lying on the sidewalk with the barrel smashed all over him.

Up until that time, the common law had required a plaintiff suing for negligence to prove just exactly who had been negligent and just exactly how such persons had been negligent, every single time. All the witnesses, however, denied seeing or knowing anything. So for obvious reasons, the plaintiff could not meet the ordinary elements of proof in a negligence case, and the defendant firmly relied on that in his defense. But in response to that, Chief Baron Pollock first announced the doctrine of *res ipsa loquitur* ("the thing speaks for itself"), saying,

> "There are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them. . . . If an article, calculated to cause damage is put in the wrong place and does mischief, I think that those whose duty it was to put it in the right place are prima facie responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them."

Byrne v. Boadle, Court of Exchequer, 2 H. & C. 722, 159 Eng. Rep. 299 (1863).

Byrne, of course, was the landmark case in which, for the sake of justice, and for very obvious reasons of practicality, the court made a fairly dramatic change in its jurisprudence if 1.) The type of thing that happened would not normally occur in the absence of negligence; and, 2.) The defendant had control over the situation during the time in question.

Do these provisions have an application to respondent Obama?

In response to the controversy surrounding the place of Obama's birth, Obama has posted online what is supposed to be a copy of his Hawaiian birth certificate. But the flaws in this "birth certificate" are so substantial, and so obvious, that it strains credibility to accept it as such. See the petitioner's web site: http://www.obamacrimes.com/ and the Petition for a Writ of Certiorari at pp. 16-17.

Question, then: Does substantial evidence of an attempted cover up ordinarily occur in the absence of someone having something to hide? This question is analogous to the first prong of the *res ipsa* test: whether the particular type of accident in question ordinarily occurs in the absence of negligence. And the answer in the instant case, of course, is no.

With respect to the second prong of the *res ipsa* test, respondent Obama has placed his supposed birth certificate in a place where it has done "mischief," as Chief Baron Pollock would put it (*i.e.*, on the face of things, it fraudulently misleads people, and seeks to have them rely on it). And respondent

Obama has had complete and exclusive control over this; again, in the words of Chief Baron Pollock, this makes him *prima facie* responsible. At a minimum, it indicates that, having placed this "birth certificate" online for all the world to see, respondent Obama has no cause to complain if a court of law should now want him to verify it.

Furthermore, under Hawaii law, the general public has no right to obtain a copy of someone's birth certificate, though respondent Obama could himself have obtained an original copy of his birth certificate, if such a thing exists. Thus, this aspect is likewise totally under respondent Obama's control. Accordingly, to complete the thought of the Chief Baron, respondent Obama must now be required to prove facts sufficient to rebut the presumption of a cover up.

Furthermore, internet sites have been raising this issue for well over a year. In all that time, respondent Obama has chosen either to ignore all requests for him to produce an actual hard copy of a Certificate of Live Birth from the state of Hawaii, or else he has spent substantial sums of money fighting all legal challenges to his constitutional eligibility to be President of the United States . . . for some reason.

He could have produced a Certificate of Live Birth from the State of Hawaii for $10.00, if he had

one.[6] And that is still all he has to do even today if he wants to relieve this Court of the bother of dealing with this case at all. But he won't. Ergo, *res ipsa loquitur.*

A potential constitutional crisis under President Barack Obama now looms more and more with each passing day. This Court must recognize that its duty to the nation and to the law in the instant case is far greater than that duty which Chief Baron Pollock faced in *Byrne v. Boadle*.

CONCLUSION

Wherefore, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LAWRENCE J. JOYCE
Counsel of Record

[6] http://www.hawaiitopia.com/?p=36

APPENDIX

District Of Columbia Code

Subchapter I. Actions Against Officers of the United States

§ 16-3501. Persons against whom issued; civil action.

A quo warranto may be issued from the United States District Court for the District of Columbia in the name of the United States against a person who within the District of Columbia usurps, intrudes into, or unlawfully holds or exercises, a franchise conferred by the United States or a public office of the United States, civil or military. The proceedings shall be deemed a civil action.

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§ 16-3502. Parties who may institute; ex rel. proceedings.

The Attorney General of the United States or the United States attorney may institute a proceeding pursuant to this subchapter on his own motion or on the relation of a third person. The writ may not be issued on the relation of a third person except by leave of the court, to be applied for by the relator, by a petition duly verified setting forth the grounds of the application, or until the relator files a bond with sufficient surety, to be approved by the clerk of the court, in such penalty as the court prescribes, conditioned on the payment by him of all costs incurred in

the prosecution of the writ if costs are not recovered from and paid by the defendant.

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§ 16-3503. Refusal of Attorney General or United States attorney to act; procedure.

If the Attorney General or United States attorney refuses to institute a quo warranto proceeding on the request of a person interested, the interested person may apply to the court by certified petition for leave to have the writ issued. When, in the opinion of the court, the reasons set forth in the petition are sufficient in law, the writ shall be allowed to be issued by any attorney, in the name of the United States, on the relation of the interested person on his compliance with the condition prescribed by section 16-3502 as to security for costs.